NOV 29 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 128.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary, *et al.*,
Appellants.

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY *et al.*,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

W. W. DEARMOND,
J. G. GROSSBERG,
Attorneys for Appellants.

CHAMPLIN LAW PRINTING CO.

TABLE OF CONTENTS.

	PAGE
Introductory statement	1
Error relied on	7
Brief	8

POINTS IN BRIEF AND ARGUMENT.

POINT NO.	SUBJECT	PAGE IN BRIEF	PAGE IN ARGUMENT
I.	Primary title was in Indians	8	41
II.	Indian title to lakes and rivers	8	46
III.	United States succeeded to title of Great Britain	9	50
IV.	Greenville Treaty was deed in partition	9	54
V.	Title is in Pottawatomies	10	62
VI.	Indian title how extinguished	11	63
VII.	Cessions in Illinois run to lake shore only	12	65
VIII.	Cessions elsewhere include portions of lakes	12	68
IX.	Title to bed of lake separate from that in upland	13	75
X.	No Indian conveyance by implication	14	79
XI.	When interpretation not allowed	15	80
XII.	Rule as to construction by parties	15	81
XIII.	Construction by later treaties	15	82
XIV.	Circumstances as aiding construction	16	84
XV.	Construction by Goverment Officers	16	86
XVI.	Limitation on power of Government Officers	16	88

POINT NO.	SUBJECT	PAGE IN BRIEF	PAGE IN ARGUMENT
XVII.	Rule as to water same as to land	17	90
XVIII.	Burden of proof is on the defendants	17	90
XIX.	Ordinary rules of construing a treaty	17	91
XX.	Rule where boundary is rigidly fixed	18	97
XXI.	Title to reclaimed land follows title to bed	19	102
XXII.	Title to bed of lakes distinct from title to uplands	19	102
XXIII.	Rule where water's edge is the boundary line	20	103
XXIV.	Complainants' title confirmed by Treaty of St. Louis of 1816	20	103
XXV.	Same by Treaty of Pottawatomie Creek of 1846	20	104
XXVI.	Same by Section 2079 R. S.	21	104
XXVII.	Restriction upon alienation bars defense of laches, etc.	21	106
XXVIII.	Land not taxable under Ordinance of 1787	22	113
XXIX.	Authority of Ordinance of 1787	22	117
XXX.	Greenville Treaty part of Supreme law	23	118
XXXI.	State statute in violation of treaty is void	23	119
XXXII.	Statute or ordinance void if in violation of Ordinance of 1787	24	122
XXXIII.	Even Government patents void if against treaty	24	123
XXXIV.	Power of Federal courts to enforce treaty	24	125
XXXV.	Mere claim cannot ripen into title	24	126
XXXVI.	Statute of limitations and laches rest on estoppel	25	130

POINT NO.	SUBJECT	PAGE IN BRIEF	PAGE IN ARGUMENT
XXXVII.	Laches and statute of limitations must be pleaded	26	133
XXXVIII.	Constructive possession is in holder of best title	26	134
XXXIX.	No constructive possession in unoccupied tracts	26	135
XL.	Depositing of material not such possession	26	135
XLI.	Adverse possession of shore lands	27	136
XLII.	Courts cannot go behind a treaty	27	136
XLIII.	Indian rights and citizenship	27	138
XLIV.	No discretion in courts to enforce treaties	28	147
XLV.	Defendants charged with notice of Greenville Treaty	27	148
XLVI.	Investment of money does not raise estoppel	29	150
XLVII.	No title by adverse possession	29	151
XLVIII.	Indian rights cannot be waived	30	153
XLIX.	Indian title absolute except as to alienation	30	154
L.	Importance of decision in Worcester *v.* Georgia	31	156
LI.	Technical terms of conveyance not necessary in treaty	31	156
LII.	Function of habendum clause	31	158
LIII.	State never acquired title	31	160
LIV.	No abandonment through mere inaction	32	164
LV.	No abandonment without cession	33	170
LVI.	Land not ceded by Tippecanoe Treaty of 1832	33	171
LVII.	Treaty binding on Government	34	174
LVIII.	Treaty cannot be amended by construction	34	175
LIX.	Indian title paramount	34	176
LX.	Removal without sale immaterial	35	178

POINT NO.	SUBJECT	PAGE IN BRIEF ARGUMENT
LXI.	No confiscation because of guardianship	35
LXII.	As to condition subsequent	35
LXIII.	Patent not required	36
LXIV.	Judicial notice of treaties, etc.	36
LXV.	Parties complainant and multiplicity of suits	36
LXVI.	Equity jurisdiction	37
LXVII.	As to tribal existence	38
LXVIII.	Status of tribal Indians	38
LXIX.	Suit not multifarious	38
LXX.	Legal remedy inadequate	39
LXXI.	Continued trespasses grounds for injunction	39
LXXII.	Case arising out of treaty	39
LXXIII.	Equity rules No. 23 and No. 38	39
LXXIV.	United States not necessary party	40
LXXV.	Defendants not entitled to jury trial	40

	PAGE
Concluding remarks	180
APPENDIX "A" ABSTRACT OF TITLE BY CHARLES HENRY BUTLER	183
Title prior to 1763	183
Title from 1763 to 1783	184
National boundaries as fixed by Treaty of 1783	185
The Virginia cession	186
Ordinance of 1787	187
Early Indian Treaties	189
Then Greenville Treaty	190
Indian treaties subsequent to 1795	191
The Treaty of Ghent	194
Greenville Treaty renewed	195
St. Louis Treaty of 1816	195
Treaties subsequent to 1816	198
Indian removals to west of Mississippi	200
Construction by Government officials	202
Pottawatomie title remains intact	206

PAGE
Title not lost by adverse possession 206
Effect of legislative acts 207
No title in State upon admission 207
Decision in Illinois Central case not binding on, Indians 209
Title to islands 210
Encroachments upon Indian territory..... 211
No title acquired as against Indians..... 212
Title not affected by canal grants 213
Land beyond shore line as surveyed not ceded by Indians 214
APPENDIX "B"—The Treaty of Greenville..... 217
APPENDIX "C"—Illinois statutes in question..... 227
Maps of Indian Cessions and Mitchell's Map..... 244

CASES CITED.

PAGE
Adams v. Akerlund, 168 Ill. 632.....18, 95
Akerlund ads. Adams, 168 Ill. 632 .....18, 95
Akers ads. Clark, 16 Kas. 166 . . ..16, 21, 29, 89, 107, 153
Alabama v. Georgia, 23 How. 505 20
Aldrich ads. Wah-Pe-Man-Qua, 28 Fed. 489.....22, 114
Alexandroff ads. Tucker, 183 U. S. 424...17, 34, 94, 175
Amiable Isabella, The, 6 Wheat. 1 .....18, 34, 95, 175
Anthony ads. Handly, 5 Wheat. 374.....14, 18, 20, 78
Arredondo, Heirs of, ads. United States, 13 Pet. 33, 166, 174
Aspdin v. Austin, 5 Q. B. 671 94
Auditor General v. Williams, 94 Mich. 180..22, 109, 114
Auger ads. United States, 153 Fed. 671.....21, 107
Austin ads. Aspdin, 5 Q. B. 671 94
Baldwin ads. Rockwell, 53 Ill. 19 .....14, 19, 77, 99
Barker v. Harvey, 181 U. S. 481 .....8, 34, 46
Bartlett v. United States, 203 Fed. Rep. 410.....17, 90
Bates v. Ill. Cent. R. R. Co., 1 Black (66 U. S.) 204.. .....14, 18, 78, 97
Beecher v. Wetherby, 95 U. S. 517 36
Berry v. Lovi, 107 Ill. 612 . .....25, 130
Best v. Doe, 85 U. S. 112..17, 21, 24, 29, 36, 89, 107, 123, 153
Blacksmith ads. Fellows, 19 How. 366..... .....8, 23, 27, 28, 118, 119, 137, 148

PAGE
Blue Jacket v. Com'rs of Johnson Co., 5 Wall. 737 . . . . . 22, 115
Board of Supervisors ads. People, 125 Ill. 9 . . . . . 13, 18, 19, 20, 75, 77, 78, 99
Bowlby ads. Shively, 152 U. S. 1 . . . . . 32, 161
Bristol v. Carroll Co., 95 Ill. 84 . 14, 18, 25, 26, 78, 129, 134
Brown v. Steele, 23 Kas. 530 38
Bugbee ads. O'Brien, 46 Kas. 13 112
Bunyan ads. Gormley, 138 U. S. 623 . . . . . 26, 133
Burcham ads. Crews, 1 Black. 352 . . . . . 34, 175
Burri ads. Peabody, 255 Ill. 592 . . . . . 25, 26, 130, 132
Buttz v. Nor. Pac. R. R. Co., 119 U. S. 55 . . . . . 33, 35, 36, 170, 178
Carpenter ads. United States, 111 U. S. 347 29, 30, 150, 154
Carroll Co. ads. Bristol, 95 Ill. 84 14, 18, 25, 26, 78, 129, 134
Cedar Point Club ads. Niles, 175 U. S. 300 20
Cherokee Nation v. Hitchcock, 187 U. S. 294 . . . . . 27, 36, 37, 38, 138, 140
Cherokee Nation ads. United States, 202 U. S. 101 . . . . . 28, 37, 138, 142
Cherokee Tobacco v. United States, 78 U. S. 616 . . 35, 179
Chew Heong v. United States, 122 U. S. 536 . . . . . 34, 175
Chicago ads. I. C. R. R. Co., 173 Ill. 471 (Affd. in 176 U. S. 646) 14, 19, 77
Chicago ads. United States, 48 U. S. 185 . . . . . 30, 154
Chicago v. Ward, 169 Ill. 392 . . . . . 13, 19, 76, 77
Child v. Starr, 4 Hit. (N. Y.) 369 14
Choate v. Trapp, 224 U. S. 665 . . . 10, 15, 17, 22, 23, 34, 35 38, 60, 79, 89, 111, 114, 116, 118, 119, 120, 122, 175, 179
Choctaw Nation v. United States, 119 U. S. 1 . . . . . 10, 15, 59, 79
Clark v. Akers, 16 Kas. 166 . . . . . 16, 21, 29, 89, 107, 153
Clark ads. Libby, 118 U. S. 250 . . . . . 10, 57, 61
Clarke ads. United States, 8 Pet. 436 . . . . . 16, 85
Cochran ads. Ward, 150 U. S. 597 . . . . . 25, 26, 128, 134
Com'rs of Johnson Co. ads. Blue Jacket, 5 Wall. 737 . . . . . 22, 115
Commrs. ads. Wan-zop-e-ch, 5 Wall. 757 37
Commrs. ads. Yellow Beaver, 5 Wall. 757 37
Cook v. McClure, 58 N. Y. 437 . . . . . 14, 18, 77, 100
Cook ads. United States, 86 U. S. 591 29
Crawford ads. Moore, 130 U. S. 122 . . . . . 25, 130

PAGE
Crews v. Burcham, 1 Black. 352 .....34, 175
Dana v. Jackson St. Wharf Co., 31 Cal. 118..14, 18, 78
DeGraffenfried ads. Woodward, 238 U. S. 234...15, 79
Denniston ads. Fellows, 5 Wall. 761 11, 22, 35, 65, 116, 178
Dibble ads. New York, 21 How. 366.....
.....11, 23, 35, 37, 40, 65, 121, 178
Doe ads. Best, 85 U.S. 112 17, 21, 24, 29, 36, 89, 107, 123, 153
Doe v. Wilson, 64 U. S. (23 How.) 457.....11, 63
Donohoe ads. Sheldon, 40 Kas. 346.....21, 108
Dupont ads. Shanks, 3 Pet. 242.....15, 84
Eslava ads. Mobile, 16 Pet. 234 20
Evans v. Victor, 204 Fed. 361..... 39
Fellows v. Blacksmith, 19 How. 366.....
.....8, 23, 27, 28, 45, 118, 119, 137, 148
Fellows v. Denniston, 5 Wall. 761..11, 22, 35, 65, 116, 178
Felps ads. Reichert, 6 Wall. 160.....17, 89
Flournoy Live Stock & Real Estate Co. ads. United States, 69 Fed. Rep. 866 .....24, 28, 37, 38, 39, 125
Fox ads. Middaugh, 135 Ill. 344 .....25, 129
Francis v. Francis, 203 U. S. 233.....9, 10, 54, 61
Franklin v. Lynch, 233 U. S. 269..17, 21, 30, 89, 107, 153
Fuller v. Shedd, 161 Ill. 462.....14, 19, 76, 77
Galway v. Met. Elev. R. Co., 13 L. R. A. 788, 128 N. Y. 132, aff'g 35 N. Y. S. R. 628.....25, 130
Georgia ads. Alabama, 23 How. 505..... 20
Georgia ads. Worcester, 6 Pet. (31 U. S.) 515..8, 9, 14, 18, 21, 27, 28, 30, 31, 45, 51, 56, 57, 93, 95, 107, 120, 137, 148, 155, 156, 160, 181 .....
Goodell v. Jackson, 20 Johns. 715 .....23, 111
Gormley v. Bunyan, 138 U. S. 623.....26, 133
Greene's Heirs ads. Rutherford, 2 Wheat. 196.....
.....10, 31, 57, 157
Grinnan ads. Halstead, 152 U. S. 412.....25, 130
Hagan ads. Pollard, 44 U. S. 229.....13, 76
Halstead v. Grinnan, 152 U. S. 412.....25, 130
Handly v. Anthony, 5 Wheat. 374.....14, 18, 20, 78
Hanzen ads. Producers Oil Co., 238 U. S. 325....13, 75
Hardin v. Jordan, 140 U. S. 371.....14, 77
Hardin v. Shedd, 177 Ill. 123.....14, 18, 76
Harriman ads. Schulenberg, 88 U. S. 44.....32, 36
Harvey ads. Barker, 181 U. S. 481.....8, 34, 46
Heath v. Wallace, 138 U. S. 573..... 36

PAGE

Heckman v. United States, 224 U. S. 413.....
. . . 17, 21, 28, 29, 37, 38, 40, 89, 107, 124, 138, 149, 152, 153
Heff, In re, 197 U. S. 488..... 27
Henkel v. United States, 237 U. S. 43.....21, 107
Hinds v. Surbeck, 260 Ill. 606.....25, 26, 27, 130, 133
Hitchcock ads. Cherokee Nation, 187 U. S. 294....
.....27, 36, 37, 38, 138, 140
Hitchcock ads. Lone Wolf, 187 U. S. 553..28, 36, 37, 139
Hodgson ads. Orr, 4 Wheat. 453.....23, 118, 119
Holden v. Joy, 84 U. S. (17 Wall.) 211....9, 17, 36, 53, 89
Holliday ads. United States, 3 Wall. 407..... 38
Hughes v. Streeter, 24 Ill. 648.....33, 173
Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401..... 40
Illinois ads. Ill. Cent. Ry. Co., 146 U. S. 387.....
.....14, 19, 30, 32, 77, 154, 160, 212, 214, 215
Ill. Cent. R. R. Co. ads. Bates, 1 Black. (66 U. S.)
204 ....14, 18, 79, 97
Ill. Cent. R. R. Co. v. Chicago, 173 Ill. 471 (Affd. in
176 U. S. 646).....14, 19, 77
Ill. Cent. Ry. Co. v. Illinois, 146 U. S. 387.....
.....14, 19, 30, 32, 77, 154, 160, 212, 214, 215
Ill. Cent. R. R. Co. v. Rucker, 14 Ill. 353.....14, 19, 77
Jackson ads. Goodell, 20 Johns. 715.....23, 111
Jackson St. Wharf Co. ads. Dana, 31 Cal. 118..14, 18, 78
Jenks ads. Patterson, 2 Pet. 216.....15, 16, 81, 84, 86
Johnson v. McIntosh, 8 Wheat. 543 8, 9, 44, 46, 51, 137, 183
Johnson ads. Rix, 5 N. H. 520.....14, 18, 78
Jones v. Meehan, 175 U. S. 1.....10, 15, 17, 58, 79, 89
Jones v. United States, 137 U. S. 202..... 36
Jordan ads. Hardin, 140 U. S. 371.....14, 77
Joseph ads. United States, 94 U. S. 614.....8, 34, 46
Joy ads. Holden, 84 U. S. (17 Wall.) 211..9, 17, 36, 53, 89
Kansas Indians, 5 Wall. 737..10, 15, 22, 37, 38, 59, 79, 114
Kathleen Oil Co. ads. Lancaster, 241 U. S. 531..28, 39, 145
Kilbourn v. Sunderland, 130 U. S. 505.....37, 39
Kirk ads. People, 162 Ill. 138.....14, 19, 77
Knevals ads. Van Wyck, 106 U. S. 360..... 32
Knight v. United Land Assn., 142 U. S. 161.....
.....8, 9, 32, 47
Ladiga's Heirs ads. Rowland & Heifner, 2 Ala. 9.. 33
Lancaster v. Kathleen Oil Co., 241 U. S. 531..28, 39, 145

PAGE

Larivirere (43 Gals. Whiskey) ads. United States, 93 U. S. 188..11, 23, 31, 35, 36, 46, 64, 118, 119, 156, 177, 178
Lasker v. McCreary, 66 Fed. 841.....25, 129
Lattimer v. Poteet, 14 Pet. 4 .....34, 175
Laughton v. Nadeau, 75 Fed. 789..... 29
Leavenworth, etc. R. R. Co. v. United States, 92 U. S. 733...16, 21, 23, 24, 29, 30, 35, 37, 89, 107, 118, 119, 123 150, 152, 153, 154, 176, 180 .....
Lee ads. Smith, 1 Coldw. (Tenn.) 549.....25, 129
LeRoy ads. San Francisco, 138 U. S. 656..8, 19, 47, 161
Libby v. Clark, 118 U. S. 250.....10, 57, 61
Lomax ads. Pickering, 145 U. S. 310.....21, 107
Lone Wolf v. Hitchcock, 187 U. S. 553....28, 36, 37, 139
Lovi ads. Berry, 107 Ill. 612.....25, 130
Lucas ads. Strother, 12 Pet. 410.....9, 16, 34, 53, 85, 175
Lurton v. Rodgers, 139 Ill. 554.....25, 130
Lynch ads. Franklin, 233 U. S. 269..17, 21, 30, 89, 107, 153
McClure ads. Cook, 58 N. Y. 437.....14, 18, 77, 100
McCreary ads. Lasker, 66 Fed. 841 .....25, 129
McDougal v. McKay, 237 U. S. 372..... 121
McDougal ads. Shulthis, 95 C. C. A. 615, 170 Fed. 529 .....23, 121
McGee ads. St. Louis, etc. Ry. Co., 115 U. S. 469..32, 36
McGuire ads. Wood, 15 Ga. 202 .....25, 129
McIntosh ads. Johnson, 8 Wheat. 543 ....8, 9, 44, 46, 51, 137, 183
McKay ads. McDougal, 237 U. S. 372..... 121
Martin v. Waddell, 41 U. S. (16 Pet.) 410.....13, 76
Meehan ads. Jones, 175 U. S. 1.....10, 15, 17, 58, 79, 89
Met. Elev. R. Co. ads. Galway, 13 L. R. A. 788; 128 N. Y. 132; aff'g 35 N. Y. S. R. 628.....25, 130
Middaugh v. Fox, 135 Ill. 344 .....25, 129
Minn. etc. R. R. Co. ads. Rice, 66 U. S. 147..... .....17, 21, 24, 30, 89, 107, 123, 153
Mitchel v. United States, 9 Pet. 711 ....8, 9, 13, 32, 46, 52, 74, 165
Mobile v. Eslava 16 Pet. 234 20
Moore v. Crawford 130 U. S. 122.....25, 130
Morrison ads. United States, 203 Fed. 364.....30, 154
Mulford ads. Ward, 32 Cal. 365..... 20
Mullen v. Simmons, 234 U. S. 192..... .....17, 21, 30, 89, 107, 152, 153

PAGE
Nadau ads. Laughton, 75 Fed. 789..... 29
Ne-Hung-Go-Ne-Sia v. State, 36 Ind. 310..... 38
New Haven ads. Society, 6 Wheat. 464 .....34, 175
New Jersey v. Wilson, 7 Cranch. 164....22, 23, 114, 122
New York v. Dibble, 21 How. 366.....
.....11, 23, 35, 38, 40, 65, 121, 178
New York Indians v. United States, 170 U. S. 1....
.....10, 18, 31, 32, 34, 36, 57, 95, 157, 159, 168
Niles v. Cedar Point Club, 175 U. S. 300..... 20
Noble ads. United States, 237 U. S. 74. .....21, 107
Northern Pac. R. R. Co. ads. Buttz, 119 U. S. 55....
.....33, 35, 36, 170, 178
Northern Pac. R. R. Co. v. Smith, 171 U. S. 260.... 37
Northern Pac. Ry. Co. v. United States, 227 U. S.
355 .....8, 10, 15, 24, 30, 43, 60, 124, 152
O'Brien v. Bugbee, 46 Kas. 13 112
Old Settlers ads. United States, 148 U. S. 427.....
.....28, 36, 37, 39, 138, 141
Orr v. Hodgson, 4 Wheat. 453.....23, 118, 119
Pacheco ads. United States, 2 Wall. 587..... 20
Paine Lumber Co. ads. United States, 206 U. S. 467
.....10, 27, 61, 137
Pam-To-Pee v. United States, 148 U. S. 691.....
.....11, 28, 37, 63, 142, 144
Pam-To-Pee v. United States, 187 U. S. 371..... 144
Patterson v. Jenks, 2 Pet. 216.....15, 16, 81, 84, 86
Peabody v. Burri, 255 Ill. 592.....25, 26, 28, 130, 132
People v. Board of Supervisors, 125 Ill. 9.....
.....13, 18, 19, 20, 75, 77, 78, 99
People v. Kirk, 162 Ill. 138.....14, 19, 77
People ads. Revell, 177 Ill. 468.....14, 19, 77
People v. San Francisco, 75 Cal. 388..... 20
Percheman ads. United States, 7 Pet. 51.....9, 18, 51
Phelps ads. St. Paul, etc. Ry. Co., 137 U. S. 528
.....16, 18, 87, 89, 95
Pickering v. Lomax, 145 U. S. 310.....21, 107
Pollard v. Hagan, 44 U. S. 299.....13, 76
Poteet ads. Lattimer, 14 Pet. 4.....34, 175
Producers Oil Co. v. Hanzen, 238 U. S. 325.....13, 75
Red Bird v. United States, 203 U. S. 76..... 27
Reese ads. United States, 5 Dill. 509, Fed Cs. 16-137
.....34, 175

PAGE
Reeve ads. Sutherland, 151 Ill. 384.....25, 130
Reichert v. Felps, 6 Wall. 160.....17, 89
Revell v. People, 177 Ill. 468.....14, 19, 77
Rice v. Minn. etc. R. R. Co., 66 U. S. 147.....
.....17, 21, 24, 30, 89, 107, 123, 153
Richardson v. Sullivan, etc. Co., 169 U. S. 128.... 20
Rickert ads. United States, 188 U. S. 432.....
.....10, 15, 22, 28, 37, 60, 114
Ritchie v. Sayers, 150 Fed. 520.....25, 130
Rockwell v. Baldwin, 53 Ill. 19.....14, 19, 77, 100
Rodgers ads. Lurton, 139 Ill. 554.....25, 130
Rowland & Heifner v. Ladiga's Heirs, 2 Ala. 9... 33
Rucker ads. Ill. Cent. R. R. Co., 14 Ill. 353....14, 19, 77
Rutherford v. Greene's Heirs, 2 Wheat. 196 10, 31, 57, 157
Saint Louis, etc. Ry. Co. v. McGee, 115 U. S. 469..32, 36
Saint Paul, etc. Ry. Co. v. Phelps, 137 U. S. 528....
.....16, 18, 87, 89, 95
San Francisco v. LeRoy, 138 U. S. 656....8, 19, 47, 161
San Francisco ads. People, 75 Cal. 388..... 20
Sayers ads. Ritchie, 150 Fed. 520.....25, 130
Schrimpscher v. Stockton, 183 U. S. 290.....21, 107, 108
Schroll ads. Trustees of Schools, 120 Ill. 509..14, 76, 100
Schulenberg v. Harriman, 88 U. S. 44.....32, 36
Schulte v. Warren, 218 Ill. 108.....14, 19, 77
Seaman v. Smith, 24 Ill. 521.....14, 19, 76, 77
Shanks v. Dupont, 3 Pet. 242.....15, 84
Shedd ads. Fuller, 161 Ill. 462.....14, 19, 76, 77
Shedd ads. Hardin, 177 Ill. 123.....14, 18, 76
Sheldon v. Donohoe, 40 Kas. 346.....21, 108
Shively v. Bowlby, 152 U. S. 1.....32, 161
Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed.
529.....23, 121
Simmons ads. Mullen, 234 U. S. 192.....
.....17, 21, 30, 89, 107, 152, 153
Sloss ads. Valentine, 103 Cal. 215..... 20
Smith ads. Hy-Yu-Tse-Mil-Kin, 194 U. S. 401..... 40
Smith v. Lee, 1 Coldw. (Tenn.) 549.....25, 129
Smith ads. Nor. Pac. R. R., 171 U. S. 260..... 37
Smith ads. Seaman, 24 Ill. 521.....14, 19, 76, 77
Smith ads. Stephens, 77 U. S. (10 Wall.) 321.....
.....17, 21, 89, 107
Smith v. Swormstedt, 16 How. 288.....28, 37, 143

PAGE
Society v. New Haven, 8 Wheat. 464..... .....34, 175
Spring ads. Tripp, 5 Sawy. (U. S.) 209, F. C. 14, 160 19
Starr ads. Child, 4 Hit. (N. Y.) 369..... 14
State ads. Ne-Hung-Go-Ne-Sia, 36 Ind. 310..... 38
Steele ads. Brown, 23 Kans. 530..... 38
Stephens v. Smith, 77 U. S. (10 Wall.) 321..17, 21, 89, 107
Stockton ads. Schrimpscher, 183 U. S. 290....21, 107, 108
Stone v. United States, 2 Wall. 525.....
.....18, 20, 24, 30, 102, 123, 154
Streeter v. Hughes, 24 Ill. 648.....33, 173
Strother v. Lucas, 12 Pet. 410.....9, 16, 34, 53, 85, 175
Sullivan, etc. Co. ads. Richardson, 169 U. S. 128.... 20
Sunderland ads. Kilbourn, 130 U. S. 505.....37, 39
Surbeck ads. Hinds, 260 Ill. 606.....25, 26, 27, 130, 133
Sutherland v. Reeve, 151 Ill. 384.....25, 130
Swormstedt ads. Smith, 16 How. 288.....28, 37, 143
Taylor ads. Terrett, 13 U. S. (9 Cranch.) 43..... 17, 90
Terrett v. Taylor, 13 U. S. (9 Cranch.) 43.....17, 190
Teschmacher v. Thompson, 18 Cal. 11..... 19
Thompson ads. Teschmacher, 18 Cal. 11..... 19
Tiger v. Western Investment Co., 221 U. S. 286... 27
Trapp ads. Choate, 224 U. S. 665....10, 15, 17, 22, 23, 34
35, 38, 60, 79, 89, 111, 114, 116, 118, 119, 120, 122, 175, 179
Tripp v. Spring, 5 Sawy (U. S.) 209, F. C. 14, 160.. 19
Trustees of Schools v. Schroll, 120 Ill. 509..14, 18, 76, 100
Tucker v. Alexandroff, 183 U. S. 424.....17, 34, 94, 175
United Land Assn. ads. Knight, 142 U. S. 161.....
.....8, 19, 32, 47, 161
United States v. Heirs of Arredondo, 13 Pet. 133
.....33, 166, 174
United States v. Auger, 153 Fed. 671.....21, 107
United States ads. Bartlett, 203 Fed. Rep. 410....17, 90
United States v. Carpenter, 111 U. S. 347..29, 30, 150, 154
United States v. Cherokee Nation, 202 U. S. 101....
.....28, 37, 138, 142
United States ads. Cherokee Tobacco, 78 U. S. 616 35, 179
United States ads. Chew Heong, 122 U. S. 536...34, 175
United States v. Chicago, 48 U. S. 185.....30, 154
United States ads. Choctaw Nation, 119 U. S. 1....
.....10, 15, 59, 80
United States v. Clarke, 8 Pet. 436.....16, 85
United States v. Cook, 86 U. S. 591..... 29

PAGE
United States v. Flournoy Live Stock & Real Estate Co., 69 Fed. Rep. 866.....24, 28, 37, 38, 39, 125
United States ads. Heckman, 224 U. S. 413.....
17, 21, 28, 29, 37, 38, 40, 89, 107, 124, 138, 149, 152, 153
United States ads. Henkel, 237 U. S. 43.....21, 107
United States v. Holliday, 3 Wall. 407..... 38
United States ads. Jones, 137 U. S. 202..... 36
United States v. Joseph, 94 U. S. 614.....8, 34, 46
United States v. Lariviere (43 Gals. Whiskey) 93 U. S. 188..11, 23, 31, 35, 36, 46, 64, 118, 119, 156, 177, 178
United States ads. Leavenworth, etc. R. R. Co., 92 U. S. 733...16, 21, 23, 24, 29, 30, 35, 37, 89, 107, 118, 119, ... 123, 150, 152, 153, 154, 176, 180
United States ads. Mitchell, 9 Pet. 711.....
.....8, 9, 13, 32, 46, 52, 74, 165
United States v. Morrison, 203 Fed. 364.....30, 154
United States ads. New York Indians, 170 U. S. 1 ..... 10, 18, 31, 32, 34, 36, 57, 95, 157, 159, 168
United States v. Noble, 237 U. S. 74.....21, 107
United States ads. No. Pac. Ry. Co., 227 U. S. 355 .....8, 10, 15, 24, 30, 43, 60, 124, 152
United States v. Old Settlers, 148 U. S. 427.....
.....28, 36, 37, 39, 138, 141
United States v. Pacheco, 2 Wall. 5, 87..... 20
United States v. Paine Lumber Co., 206 U. S. 467..
.....10, 27, 61, 137
United States ads. Pam-To-Pee, 148 U. S. 691.....
.....11, 28, 37, 63, 142, 144
United States ads. Pam-To-Pee, 187 U. S. 371..... 144
United States v. Percheman, 7 Pet. 51.....9, 18, 51
United States v. Reese, 5 Dill. 409, Fed. Cs. 16-137 34, 175
United States ads. Red Bird, 203 U. S. 76..... 27
United States v. Rickert, 188 U. S. 432.....
..... 10, 15, 22, 28, 37, 60, 114
United States ads. Stone, 2 Wall. 525.....
.....18, 20, 24, 30, 102, 123, 154
United States v. Winans, 198 U. S. 371.....
.....12, 16, 32, 68, 79, 85, 161
United States ads. Winters, 207 U. S. 564.....
.....8, 10, 12, 14, 16, 17, 47, 58, 68, 79, 85, 91
Valentine v. Sloss, 103 Cal. 215..... 20

PAGE

Van Wyck v. Knevals, 106 U. S. 360..... 32
Victor ads. Evans, 204 Fed. 361..... 39
Waddell ads. Martin, 41 U. S. (16 Pet.) 410.....13, 76
Wah-Pe-Man-Qua v. Aldrich, 28 Fed. 489.....22, 114
Wall ads. Wilson, 6 Wall. 83.....9, 17, 53, 89
Wallace ads. Heath, 138 U. S. 573..... 36
Wan-zop-e-ah v. Commrs., 5 Wall. 759..... 37
Ward ads. Chicago, 169 Ill. 392.....13, 19, 76
Ward v. Cochran, 150 U. S. 597.....25, 26, 128, 134
Ward v. Mulford, 32 Cal. 365..... 20
Warren ads. Schulte, 218 Ill. 108.....14, 19, 77
Wetherby ads. Beecher, 95 U. S. 517..... 36
Western Investment Co. ads. Tiger, 221 U. S. 286... 27
Williams ads. Auditor General, 94 Mich. 180..22, 109, 114
Wilson ads. Doe, 64 U. S. (23 How.) 457.....11, 63
Wilson ads. New Jersey, 7 Cranch. 164..22, 23, 114, 122
Wilson v. Wall, 6 Wall. 83.....9, 17, 53, 89
Winans ads. United States, 198 U. S. 371.....
.....12, 16, 32, 68, 79, 85, 161
Winters v. United States, 207 U. S. 564.....
.....8, 10, 12, 14, 16, 17, 47, 58, 68, 79, 85, 91
Woodward v. DeGraffenfried, 238 U. S. 234.....15, 79
Wood v. McGuire, 15 Ga. 202.....25, 129
Worcester v. Georgia, 6 Pet. (31 U. S.) 515.....
8, 9, 14, 18, 21, 27, 28, 30, 31, 45, 51, 56, 57, 93, 95, 107, 120, 137, 148, 155, 156, 160, 181.....
Yellow Beaver v. Commrs., 5 Wall. 757..... 37

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 128.

JOHN WILLIAMS, Chief; MICHAEL WILLIAMS, Secretary, *et al.*,

Appellants.

vs.

CITY OF CHICAGO, ILLINOIS CENTRAL RAILROAD COMPANY *et al.*,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS.

INTRODUCTORY STATEMENT.

This is an appeal from an order or decree of the District Court of the United States for the Northern District of Illinois dismissing on motion of defendants, a bill of complaint filed by appellants. This was equivalent to sustaining a demurrer to the bill under the former prac-

tice, and hence the question on this appeal is whether the allegations in the bill are sufficient to entitle the complainants to relief. The bill was filed by the tribal officers of the Pokagon Band of the Pottawatomie Nation of Indians on behalf of themselves, the band, and the nation, and of all others, if any who are entitled to join with them, and against the City of Chicago, several railroad companies, park commissions and the Illinois Steel Company, corporations, who occupy or have claim to portions of the submerged and reclaimed lands of Lake Michigan, the Indian title to which has never been extinguished. In principle this would also include an island formerly in the lake, east of the City of Chicago, but now joined to the mainland; but the bill does not specifically mention the island.

This Pokagon Band are the same group who, under the title of "the Pottawatomie of Michigan and Indiana" filed one of the petitions (#1133) which were under consideration by this court in the case *of Pam-to-Pee* v. *United States* and *Pottawatomie Indians* v. *United States,* 148 U. S. 691; but were not the ones referred to in the opinion of the court as having "no longer have any tribal organization." The fact of the tribal organization is averred in the bill and for the purpose of the motion to dismiss made in the court below and there sustained, will be assumed as a fact on this appeal.

The prayer of the bill is for injunction to restrain certain trespasses and seizures taking place and threatened of some of the land involved, to quiet title, and to declare invalid and unconstitutional certain statutes of Illinois and an ordinance of the

City of Chicago, passed in reliance on one of the statutes, by color of authority of which the trespasses and seizures were being committed. Complainants' title is at least partly based on the so-called Greenville Treaty of August 3, 1795, which was in the nature of a partition deed between the government and the Indians, and also on other treaties; and the ordinance and statutes are alleged to be in violation of this and of other treaties and laws of the United States, as depriving complainants of due process of law, and as in impairment of the obligation of contracts.

The lands are of great value; but it is a matter of public notoriety that the title to large tracts of them has been in much dispute, and the litigation as to one large portion, that claimed by the Illinois Central Railroad, has reached this court. (*I. C. R. R. Co.* v. *Chicago*, 146 U. S. 387.) The complainants were not a party to that litigation and hence are not precluded. Owing perhaps to this uncertainty as to the title, but few improvements of much value had been made on the land prior to the time when this bill was filed; and nearly all of them were made after the complainants had publicly asserted their claim and with knowledge or notice thereof (Transcript 5).

The history of the title claimed is concisely set up in the bill, which is comparatively brief and does not lend itself to much condensation; and we respectfully refer to the bill for a statement of the complainants' case (Transcript 1-12), rather than repeat the allegations here. But the nature of the title may be briefly summed up as the original In-

dian title (usually termed the perpetual right of occupancy) *plus* the title which the United States had in 1795: hence a title in fee simple, restricted solely by the provision that the lands shall be "sold only to the United States." As the land had been offered for sale to the government and the latter has refused to buy, the title resolves itself into one of absolute fee simple (Transcript 6). By the language of the treaty the United States "relinquished their claims" to the Indians, without any restriction or limitation whatever, other than that on alienation. And this title of the Indians has never been, in any manner, extinguished. All subsequent cessions by the Indians of land in Illinois bordering on Lake Michigan were by metes and bounds and ran to the shore line only.

It is complainants' contention that the substantive relief prayed in the bill may be granted even if the title be still one of occupancy, for that right is perpetual, and under the treaty is guaranteed to the complainants until sale "in the quiet enjoyment of their lands against all other white persons who intrude upon the same"; this is really, in substance, the language of a warranty deed in fee simple; and as there has been no sale, the *perpetual* period has not yet expired during which the Indians are entitled to invoke the protection of the United States against intruders, which they do by this proceeding

The foregoing really states the substance of the whole case, which in the opinion of appellants' counsel is quite simple, notwithstanding its seemingly far-reaching nature. If this had involved a small strip

worth only a few hundred or a few thousand dollars in Montana or Oklahoma where an Indian title is not a novelty, it is doubtful if a defense would have been made or thought of. Substantially, the claim of the defendants, as presented in the court below, is that, notwithstanding the seemingly plain language of the treaties, the Indians, firstly, had no title originally to any part of the Great Lakes, and that the Great Lakes were excepted from the relinquishment to them of the title to the Northwest Territory by the government; secondly, that if they did, they impliedly or by some general expressions used, ceded them in later treaties; or, thirdly, they lost their title by "abandonment," by laches, or by statutes of limitations. There is also some objection to the bill on such grounds as alleged improper parties, want of federal jurisdiction, want of equitable jurisdiction, insufficient description of the lands claimed, etc. The position of appellants is that both as to form and substance, defendants' contentions are in practically every instance either against the plain language of treaties or of statutory provisions, or else against definite, if not oft-repeated, decisions of this court.

Mr. Charles Henry Butler, the very able and learned reporter of the decisions of this court and author of "The Treaty-Making Power of Congress," had at one time occasion to abstract and analyze this title; and we give his abstract in full, as a comprehensive statement of appellants' title (Appendix A).

Part II of "The 18th Annual Report of the Bureau of American Ethnology to the Secretary

of the Smithsonian Institution" is a government publication dealing exclusively with Indian Land Cessions in the United States. This volume will hereafter be referred to as "Indian Land Cessions." *The part of Lake Michigan in question is not included in the Schedule of Cessions nor in any of the Maps of Cessions; and yet all cessions, the boundaries of which extend into the Great Lakes, are shown accordingly, both in the schedule and on the maps.* The cessions along the Illinois shore of Lake Michigan are numbered 78, 148, 177 and 187, and both the descriptions and maps show them as *running to the shore line only.* See pages 680-681, 722-723 and 750-751 of "Indian Land Cessions" and maps 17 and 18. Contrast these with descriptions and maps of cessions, of which the boundaries extend into the Great Lakes, viz., cessions numbered 53, 66, 111, 205, 219, 261, shown on pages 666-667, 674-675, 698-699, 756-757, 760-761, 776-777 and on maps 29, 64 and 49. The portion of Mitchell's map in question is here reproduced for two purposes: First, that of showing that Great Britain, the predecessor in title to the United States, recognized the Indian ownership in the lakes as well as the upland (for *the then supposed boundary line was run through the lakes*); and second, that Great Britain had never even claimed title in the western portion of Lake Michigan as against the Indians; and as stated in Mr. Butler's abstract or opinion of title (Secs. 2, 8) the correctness of this map has been admitted by the United States as well as Great Britain. (Treaty of London, Sept. 29, 1827, U. S. Treaties and Constitutions, 1889.)

In addition to the foregoing, therefore, and to the bill and exhibits printed in the transcript of the record, we present as part statement of our case or for purposes of reference the following, printed as an Appendix to our brief and argument.

A. Mr. Butler's abstract or analysis of the Indian title.

B. The Greenville Treaty of August 3, 1795, omitting only the names signed to it.

C. The pertinent portions of the several Illinois statutes complained of under which the several defendants claim title or threaten to make seizures.

D. A pertinent part of Mitchell's map, agreed upon as authentic by the American and British Governments in article IV of the Treaty of London, September 29, 1827.

E. Maps of cessions in the Northwest Territory from the Indians to the United States, which touch or embrace any portion of the Great Lakes, being photographic copies from "Indian Land Cessions."

Error Relied On.

The District Court erred in dismissing the bill of complaint as amended.

BRIEF.

I.

The primary title to the country known to history as the Northwest territory, whatever the nature of that title, was in the Indians.

Northern Pacific Ry. Co. v. *United States*, 227 U. S. 355, 366.

Johnson v. *M'Intosh*, 8 Wheat. 543, 547, 596.

Barker v. *Harvey*, 181 U. S. 481.

Mitchel v. *United States*, 9 Pet. 711, 754, *et seq.*

United States v. *Joseph*, 94 U. S. 614.

Fellows v. *Blacksmith*, 19 How. 366.

Worcester v. *Georgia*, 6 Pet. 515, 544, 545.

Indian Land Cessions, 535, 553, 554, 640.

American State Papers, Class II, Vol. I "Indian Affairs," pp. 13, 53.

II.

This title included lakes and rivers and their islands and the submerged lands as well as the upland.

Winters v. *United States*, 207 U. S. 564.

Treaty of Greenville, Art. 4 (2 Kappler, 41).

Knight v. *United Land Association*, 142 U. S. 161.

San Francisco v. *LeRoy*, 138 U. S. 656.

American State Papers, Class R.
American State Papers, Class R., Vol. 1, p. 573, 574.

III.

The treaty of cession of 1783 whereby the country was ceded by Great Britain to the United States, conveyed merely whatever claim or title Great Britain had, and was subject to that of the Indians. In other words, the United States acquired no greater title than Great Britain had before that.

Treaty of Peace of 1783.
Worcester v. *Georgia*, 6 Pet. 515, 544, 555.
Johnson v. *M'Intosh*, 8 Wheat. 543, 584.
United States v. *Percheman*, 7 Pet. 51, 86.
Mitchel v. *United States*, 9 Pet. 711, 734, 749, 754, 756.
Strother v. *Lucas*, 12 Pet. 410, 435.
Wilson v. *Wall*, 6 Wall. 83.
Holden v. *Joy*, 84 U. S. (17 Wall.) 211.
Francis v. *Francis*, 203 U. S. 233, 239.

IV.

The so-called Greenville Treaty of August 3, 1795, between the United States and the twelve Indian Nations or Tribes of the Northwest territory, was for practical purposes a deed in partition; and each party to the partition took an absolute fee simple title in the part deeded to him.

Greenville Treaty, Arts. 3, 4, 5.
Worcester v. *Georgia*, 6 Pet. 515, 553, 582.

Rutherford v. *Greene's Heirs*, 2 Wheat. 196.
New York Indians v. *United States*, 170 U. S. 1, 16, 20.
Libby v. *Clark*, 118 U. S. 250.
Winters v. *United States*, 207 U. S. 564, 576.
Jones v. *Meehan*, 175 U. S. 1, 10, 11, 12.
The Kansas Indians, 5 Wall. 737.
Choctaw Nation v. *United States*, 119 U. S. 1.
Choate v. *Trapp*, 224 U. S. 665, 675.
N. P. R. Co. v. *United States*, 227 U. S. 355, 366, 367.
United States v. *Rickert*, 188 U. S. 432.
Indian Land Cessions, p. 535.
Francis v. *Francis*, 203 U. S. 233, 239.
United States v. *Paine Lumber Co.*, 206 U. S. 467, 473.

V.

As between the twelve Indian nations who were party to the Greenville Treaty the land was held in severalty by the respective nations; and the land in question was the property of the United Nation of Ottawas, Chippewas and Pottamatomies, usually, though, referred to as the Pottawatomie Tribe or Nation.

Smithsonian Institute Bureau of American Ethnology, Vol. 2, Bulletin 30.
Treaty of St. Louis of August 24, 1816, 2 Kappler Indian Affairs, p. 132.
First Treaty of Chicago of August 29, 1821, *ibid*, p. 198.

Treaty of the Wabash of October 16, 1826, *ibid*, p. 273.

Treaty of St. Joseph of September 20, 1828, *ibid*, p. 294.

Treaty of Camp Tippecanoe of October 20, 1832, *ibid.*, p. 353.

Treaties of Tippecanoe River of October 26-27, 1832, *ibid.*, pp. 367, 372.

Second Treaty of Chicago of September 26, 1833, *ibid.*, p. 402.

Doe v. *Wilson*, 64 U. S. (23 How.) 457.

Pam-To-Pee v. *United States*, 148 U. S. 691.

VI.

Prior to 1871 there was no way of extinguishing the title to any Indian land except by conquest or by voluntary cession from the Indians to the Government.

Article 3, Ordinances of 1787.

2 Kappler Indian Affairs, p. 42.

United States v. 43 *Gals. of Whiskey*, 93 U. S. 188.

Annual Report of Commissioner of Indian Affairs for 1890 (page xxix).

Fellows v. *Denniston*, 5 Wall. 761.

New York v. *Dibble*, 21 How. 366.

VII.

All the cessions by the Pottawatomie Nation of Illinois lands bordering on Lake Michigan run to the shore of the lake only, and do not include any islands nor any part of the bed of the lake.

Treaty of St. Louis of August 24, 1816, 2 Kappler, 132.

Treaty of Prairie due Chien of July 29, 1829, 2 Kappler, 297.

Treaty of Chicago of September 26, 1833, 2 Kappler, 402.

Treaty of Camp Tippecanoe of October 20, 1832, 2 Kappler, 353.

VIII.

That by the Indian cessions of the Illinois uplands bordering on Lake Michigan it was not intended to include the islands or any part of the bed of the lake, is shown by the fact that the cessions of lands in the Northwest territory bordering on other parts of Lake Michigan and the other Great Lakes expressly included parts of the lakes, and the islands and boundaries of the cessions were run into and across the lakes as well as the uplands.

Winters v. *United States*, 207 U. S. 564.

United States v. *Winans*, 198 U. S. 371, 381.

Treaty of Greenville of Aug. 3, 1795, 2 Kappler's Indian Affairs, 2nd Ed., p. 40.

Treaty of Fort Industry of July 4, 1805, 2 Kappler, 77, Art. II.

Treaty of Detroit of November 17, 1807, 2 Kappler, 93, Art. I.

Treaty of Miami of September 29, 1817, 2 Kappler, 145.

Treaty of Saginaw, Michigan, of September 24, 1819, 2 Kappler, 185.

Treaty of Washington of March 28, 1836, 2 Kappler, 450.

Treaty of Detroit of January 14, 1837, 2 Kappler, 482.

Treaty of LaPointe of Lake Superior of October 4, 1842, 2 Kappler, 542.

Mitchel v. *United States*, 9 Pet. 711, 749.

IX.

None of the other cessions of the lands of the Pottawatomies south of the Milwaukee River in Wisconsin and of the Grand River in Michigan, or for that matter, of any of the Indian Nations embraces the lands in question. (See No. VII, *ante*.) When a cession or a conveyance of upland is bounded by the shore of a stream or lake the ownership of the bed or submerged lands is separated from that of the upland and remains in the previous owner.

People v. *Board of Supervisors*, 125 Ill. 9, 23.

Producers Oil Co. v. *Hanzen*, 238 U. S. 325, 338.

Farnham on Waters and Water Rights, Secs. 837, 849, 857, 858, 861.

Chicago v. *Ward*, 169 Ill. 392, 406.

Angel on Water Courses, Sec. 41.

Martin v. *Waddell*, 41 U. S. (16 Pet.) 410.

Pollard v. *Hagan*, 44 U. S. 229.

Gould on Waters, Secs. 32, 155, 200, 202.
Fuller v. *Shedd*, 161 Ill. 462.
Seaman v. *Smith*, 24 Ill. 521.
Trustees of Schools v. *Schroll*, 120 Ill. 509.
Hardin v. *Shedd*, 177 Ill. 123.
Child v. *Starr*, 4 Hit. (N. Y.) 369.
Hardin v. *Jordan*, 140 U. S. 371.
Rockwell v. *Baldwin*, 53 Ill. 19.
Schulte v. *Warren*, 218 Ill. 108.
Revell v. *People*, 177 Ill. 468.
People v. *Kirk*, 162 Ill. 138.
Ill. Cent. Ry. Co. v. *Illinois*, 146 U. S. 387.
I. C. R. R. Co. v. *Chicago*, 173 Ill. 471 (affirmed in 176 U. S. 646).
I. C. R. R. Co. v. *Rucker*, 14 Ill. 353.
Cook v. *McClure*, 58 N. Y. 437.
Rix v. *Johnson*, 5 N. H. 520.
Dana v. *Jackson St. Wharf Co.*, 31 Cal. 118.
Bates v. *Illinois Cent. R. R. Co.*, 1 Black (66 U. S.) 204.
Bristol v. *Carroll Co.*, 95 Ill. 84.
3 Kent's Commentaries, 434.
Handly v. *Anthony*, 5 Wheat. 374.

X.

Nothing passes in an Indian treaty by implication; on the contrary, the most clear and unambiguous term must be employed. All that is not expressly conveyed is reserved, and if ambiguities occur they must be resolved from the standpoint of the Indians.

Winters v. *United States*, 207 U. S. 564, 576.
Worcester v. *Georgia*, 6 Pet. (31 U. S.) 515, 582.

Jones v. *Meehan,* 175 U. S. 1, 10, 11, 12.
Kansas Indians, 5 Wall, 737, 760.
Choctaw Nation v. *United States,* 119 U. S. 1, 27, 28.
Choate v. *Trapp,* 224 U. S. 665, 675.
Northern P. R. Co. v. *United States,* 227 U. S. 355, 366, 367.
United States v. *Rickert,* 188 U. S. 432, 443.
Woodward v. *De Graffenfried,* 238 U. S. 234.

XI.

It is not allowable to interpret what has no need of interpretation.

Vattel's Maxims for Interpreting Treaties.
Law of Nations, Book 2, Chap. 17.

XII.

Where a construction in a treaty had been adopted by the parties it should be followed.

Patterson v. *Jenks,* 2 Pet. 216, 230, 231.
2 Kappler, 40.

XIII.

By recognizing in numerous treaties subsequent to that of Greenville the Indian title to the lakes, rivers and islands in the Northwest Territory, both the Government and the Indians have construed the Greenville Treaty as embracing the islands and submerged lands of Lake Michigan.

Treaty of Greenville, Art. V, 2 Kappler, 42.
Shanks v. *Dupont,* 3 Pet. 242.

28 Am. & Eng. Ency. of Law, page 519 (2nd Ed.).

Patterson v. *Jenks*, 2 Pet. 216, 230.

XIV.

Circumstances existing at the time of making the treaty may be considered.

Strother v. *Lucas*, 12 Pet. 410, 438.

United States v. *Clark*, 8 Pet. 436, 462.

United States v. *Winans*, 198 U. S. 371, 381.

Winters v. *United States*, 207 U. S. 564, 576.

XV.

A construction placed upon a treaty provision by Government officers whose duty it is to construe and apply them, is entitled to great weight.

Patterson v. *Jenks*, 2 Pet. 216, 229, 230.

S. Paul, etc. Ry. Co. v. *Phelps*, 137 U. S. 528.

XVI.

But even if the construction or the policy of Department officers had been otherwise, the rights of the complainants would not have been affected, for a supposed policy or practice of Congress or of any of the Government Departments cannot control or overcome the plain provisions of a statute, and hence of a treaty.

St. Paul, etc. R. Co. v. *Phelps*, 137 U. S. 528.

Clark v. *Akers*, 16 Kas. 166.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Best v. *Doe*, 85 U. S. 112.
Heckman v. *United States*, 224 U. S. 413, 446.
Rice v. *Minn., etc. R. R. Co.*, 66 U. S. 147.
Mullen v. *Simmons*, 234 U. S. 192.
Franklin v. *Lynch*, 233 U. S. 269.
Jones v. *Meehan*, 175 U. S. 1, 32.
Wilson v. *Wall*, 6 Wall. 83, 89.
Reichert v. *Felps*, 6 Wall. 160.
Smith v. *Stephens*, 10 Wall. 321. 327.
Holden v. *Joy*, 17 Wall. 211, 247.
Choate v. *Trapp*, 224 U. S. 665, 677, 678.
Bartlett v. *United States*, 203 Fed. Rep. 410.
Terrett v. *Taylor*, 13 U. S. (9 Cranch.) 43.

XVII.

The foregoing rule applies to water as well as to land.

Winters v. *United States*, 207 U. S. 564.

XVIII.

Title in the complainants being established by virtue of the Greenville Treaty, the burden of showing that that title has been at any time divested is on the defendants.

U. S. Rev. Stat., Sec. 2126 (1 Kappler, 15).

XIX.

Even under ordinary rules of construction, a treaty should be construed the same as a statute, a contract, or an ordinary instrument in writing.

Tucker v. *Alexandroff*, 183 U. S. 424, 436.

Adams v. *Akerlund*, 168 Ill. 632, 638.
The Amiable Isabella, 6 Wheat. 1, 72.
U. S. v. *Percheman*, 7 Pet. 51.
Worcester v. *Georgia*, 6 Pet. 515, 553, 554.
St. Paul, etc. Ry. Co. v. *Phelps*, 137 U. S. 528.
New York Indians v. *U. S.*, 170 U. S. 1, 20.

XX.

Even under ordinary rules of construction, where land along the shore is clearly and rigidly fixed by deed or by survey, it will not be afterwards changed even by accretions.

Gould on Waters, Sec. 155.
Cook v. *McClure*, 58 N. Y. 437.
Rix v. *Johnson*, 5 N. H. 520.
Dana v. *Jackson St. Wharf Co.*, 31 Cal. 118.
Bristol v. *Carroll Co.*, 95 Ill. 84.
3 Kent's Commentaries, 434.
People v. *Board of Supervisors*, 125 Ill. 9, 23, 24.,
Farnham on Waters and Water Rights, Secs. 837, 849, 857, 858, 861.
Handly v. *Anthony*, 5 Wheat. 374.
Hardin v. *Shedd*, 177 Ill. 123.
Bates v. *Illinois Central R. R. Co.*, 1 Black, 204, 207.
Trustees of Schools v. *Schroll*, 120 Ill. 509, 518.
Stone v. *United States*, 2 Wall. 525.

XXI.

Even under ordinary rules relating to property in the bed of lakes and rivers, reclaimed or made land follows the title to the bed.

Farnham on Water and Water Rights, Sec. 845.

XXII.

In the case of large bodies of irregular shape like The Great Lakes, the title to submerged lands is separate and distinct from the title to the shore lands.

Chicago v. *Ward*, 169 Ill. 392, 406.
Fidler v. *Shedd*, 161 Ill. 462.
Seaman v. *Smith*, 24 Ill. 521.
People v. *Board of Supervisors*, 125 Ill. 9, 23.
Rockwell v. *Baldwin*, 53 Ill. 19.
Schulte v. *Warren*, 218 Ill. 108.
Revell v. *People*, 177 Ill. 468.
People v. *Kirk*, 162 Ill. 138.
Ill. Cent. Ry. Co. v. *Illinois*, 146 U. S. 387.
I. C. R. R. Co. v. *Chicago*, 173 Ill. 471, affirmed in 176 U. S. 646.
I. C. R. R. Co. v. *Rucker*, 14 Ill. 353.
San Francisco v. *LeRoy*, 138 U. S. 656.
Knight v. *United States Land Assn.*, 142 U. S. 161.
Tripp v. *Spring*, 5 Sawy. (U. S.), 209, F. C. 14, 160.
Teschmacher v. *Thompson*, 18 Cal. 11.

Ward v. *Mulford*, 32 Cal. 365.
People v. *San Francisco*, 75 Cal. 388.
Valentine v. *Sloss*, 103 Cal. 215.
Mobile v. *Eslava*, 16 Pet. 234.
Richardson v. *Sullivan, etc. Co.*, 169 U. S. 128.

XXIII.

Even in the case of running streams or marshes, the conveyance of the shore line does not carry with it conveyance of the bed of the stream where the deed makes the water's edge the boundary line.

People v. *Board of Supervisors*, 125 Ill. 9.
Alabama v. *Georgia*, 23 How. 505, 515.
Stone v. *United States*, 2 Wall. 525.
Handly v. *Anthony*, 5 Wheaton, 374.
Niles v. *Cedar Point Club*, 175 U. S. 300.
United States v. *Pacheco*, 2 Wall. 587.

XXIV.

The rights of the Pottawatomies under the Greenville Treaty were again reiterated and reassured to them by the Treaty of St. Louis of 1816.

Treaty of St. Louis of Aug. 24, 1916, Art. III (2 Kappler, 133).

XXV.

The same assurance was renewed to them in the Treaty of Pottawatomie Creek June 5th and 17th, 1846.

Treaty of Pottawatomie Creek of June 5 and 17, 1846, Art. II, 2 Kappler, 558.

XXVI.

The assurance was repeated in Section 2079 of the Revised Statutes, enacted March 3, 1871.

Sec. 2079 R. S. (1 Kappler, 8).

Sec. 2013 R. S.

XXVII.

The restriction upon alienation contained in the Greenville Treaty relieves the Indians from the necessity or obligation of making any assertion or claim to title in or out of court, and their title is not affected or impaired by any Statute of Limitations, adverse possession (if any) or the rule of laches.

United States v. *Auger*, 153 Fed. 671.

Stephens v. *Smith*, 77 U. S. 321.

Schrimpscher v. *Stockton*, 183 U. S. 290, 299.

Pickering v. *Lomax*, 145 U. S. 310, 316.

United States v. *Noble*, 237 U. S. 74.

Henkel v. *United States*, 237 U. S. 43.

Clark v. *Akers*, 16 Kas. 166.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Best v. *Doe*, 85 U. S. 112.

Heckman v. *United States*, 224 U. S. 413, 446.

Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.

Mullen v. *Simmons*, 234 U. S. 192.

Franklin v. *Lynch*, 233 U. S. 269.

Worcester v. *Georgia*, 6 Pet. 515, 557.

Sheldon v. *Donohoe*, 40 Kas. 346.

Auditor General v. *Williams*, 94 Mich. 180.
Choate v. *Trapp*, 224 U. S. 665, 671.
O'Brien v. *Bugbee*, 46 Kas. 13.

XXVIII.

Until the extinguishment of the Indian title the land in question was not even taxable, nor would it be for five years thereafter under the provisions of the Ordinance of 1787, and under the Enabling Act for admitting Illinois as a state.

Wah-Pe-Man-Qua v. *Aldrich*, 28 Fed. 489.
Auditor General v. *Williams*, 94 Mich. 180.
Choate v. *Trapp*, 224 U. S. 665.
New Jersey v. *Wilson*, 7 Cranch, 164.
The Kansas Indians, 5 Wall. 737, 761.
United States v. *Rickert*, 188 U. S. 432.
1 Jones & Addington, Ill. Stat. Ann. 63. Sec. 8, Ordinance of 1787.
Blue Jacket v. *Com'rs of Johnson Co.*, 5 Wall. 737.
Fellows v. *Denniston*, 5 Wall. 761.

XXIX.

The Ordinance of 1787 is part of the fundamental law of Illinois, of substantially the same authority of the Constitution of the United States, and is part of the Supreme law of the land.

Enabling Act of April 18, 1818.

XXX.

The provisions of the Greenville Treaty are also part of the Supreme law of the land.

Article VI, Federal Constitution.

Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733.

United States v. 43 *Gals. of Whisky,* 93 U. S. (3 Otto), 188.

Fellows v. *Blacksmith,* 19 How. 366, 372.

Orr. v. *Hodgson,* 4 Wheat. 453.

Choate v. *Trapp,* 224 U. S. 665.

XXXI.

An Indian treaty is at least a contract, and property rights thereby acquired are entitled to the same constitutional protection as any other property rights, and more so. Any State statute which is in violation of the constitutional provision or of treaty rights is void.

United States v. 43 *Gals. of Whiskey,* 93 U. S. (3 Otto), 188.

Fellows v. *Blacksmith,* 19 How. 366.

Orr v. *Hodgson,* 4 Wheat. 453.

N. J. v. *Wilson,* 7 Cranch. 164, 166.

Choate v. *Trapp,* 224 U. S. 665, 678.

Goodell v. *Jackson,* 20 Johns. 715.

Shulthis v. *McDougal,* 95 C. C. A. 615, 170 Fed. 529.

New York v. *Dibble,* 21 How. 366, 371.

XXXII.

Any statute or ordinance depriving or tending to deprive Indians of their property is also void under Article 3 of the Ordinance of 1787.

Article III, Ordinance of 1787.

XXXIII.

Even Government patents are void if in violation of Indian treaty rights.

Northern Pacific Ry. Co. v. *United States*, 227 U. S. 355, 358.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Stone v. *United States*, 2 Wall. 525.

Best v. *Doe*, 85 U. S. 112.

Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.

XXXIV.

The power to enforce treaty provisions is paramount and supreme, and rests in the Federal Courts upon every foot of soil within the boundaries of the United States.

U. S. v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. Rep. 866, 893.

XXXV.

Even if this were not an Indian title, no mere claim of title, not accompanied by actual physical, adverse possession, held for the full period of the Statute of Limitations, could ripen into a title. Such a title manifestly cannot be set up as against submerged

land or recently reclaimed land, nor against vacant or unoccupied, nor against untaxed or untaxable land.

Wood on Limitations, 3rd Ed., Sec. 262.
2 C. J. 51, 53, 70.
Ward v. *Cochran*, 150 U. S. 597, 608.
Smith v. *Lee*, 1 Coldw. (Tenn.) 549, 552.
Bristol v. *Carroll County*, 95 Ill. 84, 93.
Farnham on Water and Water Rights, Sec. 837.
Middaugh v. *Fox*, 135 Ill. 344.
Lasker v. *McCreary*, 66 Fed. 841.
Ritchie v. *Sayers*, 150 Fed. 520.
Halstead v. *Grinnan*, 152 U. S. 412.
Moore v. *Crawford*, 130 U. S. 122.
Lurton v. *Rodgers*, 139 Ill. 554.
Sutherland v. *Reeve*, 151 Ill. 384.
Berry v. *Lovi*, 107 Ill. 612.
Hinds v. *Surbeck*, 260 Ill. 606.
Peabody v. *Burri*, 255 Ill. 592, 603.
Galway v. *Met. Elev. R. Co.*, 13 L. R. A. 788; 128 N. Y. 132; Affg. 35 N. Y. S. R. 628.
Wood v. *McGuire*, 15 Ga. 202.

XXXVI.

All statutes of limitations are based upon the theory of laches and the theory of laches in its turn can be invoked only upon a state of facts where some detriment or prejudice had been suffered; and where the complainants have not expended in improvements and taxes in the excess of the rents or

benefits received on the land, neither laches nor the statute of limitations can be invoked.

Hinds v. *Surbee*, 260 Ill. 606.
Peabody v. *Burri*, 255 Ill. 592.

XXXVII.

Both laches and the statute of limitations are affirmative defenses and to be availed of must ordinarily be pleaded.

1 Daniell's Ch. Pl. & Pr., 561.
Gormley v. *Bunyan*, 138 U. S. 623.

XXXVIII.

Even as against persons other than Indians the constructive possession of land is always in the holder of the best title.

2 Corpus Juris, 53.
Ward v. *Cochran*, 150 U. S. 597, 608.
Bristol v. *Carroll County*, 95 Ill. 84, 93.

XXXIX.

The doctrine of Constructive Possession under color of title cannot be extended to large tracts of land not taken for the ordinary purposes of cultivation and occupation.

Wood on Limitations, 3rd Ed., Sec. 262.

XL.

The depositing of material, etc., is not such possession.

2 Corpus Juris, 70, 71, 72.

XLI.

Even as against persons other than Indians, an adverse possession of the shore lands can never give right or title in the submerged lands.

Farnham on Water and Water Rights, Sec. 837.

2 Corpus Juris, 71, 72.

XLII.

The nature of the Indian title which existed prior to the Greenville Treaty is entirely immaterial, for courts cannot go behind a treaty.

Fellows v. *Blacksmith*, 19 How. 366.

United States v. *Paine Lumber Co.*, 206 U. S. 467.

Worcester v. *Georgia*, 6 Pet. 515, 593.

XLIII.

Even if some or all of the Pottawatomie Nation have become citizens that would not affect their title to the property.

An Indian retains all his rights to tribal property notwithstanding that he may have become a citizen.

1 Kappler on Indian Laws and Treaties, 23.

18 U. S. Rev. Stat. 402, Sec. 15.

Red Bird v. *United States*, 203 U. S. 76.

Tiger v. *Western Investment Co.*, 221 U. S. 286, 311.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 295, 300.

In re Heff, 197 U. S. 488, 503.

United States v. *Rickert*, 188 U. S. 432, 445.
United States v. *Flournoy Live Stock and Real Estate Co.*, 69 Fed. Rep. 886.
United States v. *Cherokee Nation*, 202 U. S. 101, 127.
United States v. *Old Settlers*, 148 U. S. 427, 481.
Heckman v. *United States*, 224 U. S. 413, 436.
Lone Wolf v. *Hitchcock*, 187 U. S. 553, 560.
Pam-To-Pee v. *United States*, 148 U. S. 691, 699, 704, 705.
Smith v. *Swormstedt*, 16 How. 288, 302.
Sec. 2119 R. S. (1 Kappler, 35).
Lancaster v. *Kathleen Oil Co.*, 241 U. S. 531.
Equity Rules 23 and 38.

XLIV.

So long as treaties and laws remain in full force the judiciary power can exercise no discretion in refusing to give effect to those laws when questions arise under them, unless they shall be deemed unconstitutional.

Worcester v. *Georgia*, 6 Pet. 515, 594.
Fellows v. *Blacksmith*, 19 How. 366.

XLV.

Any and all acts of the defendants in seizing any of the lands in question, or even making valuable or lasting improvements thereon, cannot affect the title

of the complainants, for the defendants were bound to take notice of the Greenville Treaty and of its provisions.

Laughton v. *Nadeau*, 75 Fed. 789, 793.
United States v. *Carpenter*, 111 U. S. 347.
United States v. *Cook*, 86 U. S. 591.
Heckman v. *United States*, 224 U. S. 413, 446.

XLVI.

The fact that people invested or loaned money on land the title to which is in the Indians, does not give such parties any claim to such lands nor strengthen the title adversely to the Indians.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

XLVII.

None of the defendants can acquire title by mere acts of seizure or possession no matter how long continued. Even a direct conveyance to them by the Indians would have given them no title and they cannot acquire title indirectly which they could not have acquired by direct conveyance.

A conveyance made in violation of a treaty will not even create an equitable asset in the grantee, although he may have paid all the purchase money and have taken actual possession of the land.

Clark v. *Akers*, 16 Kas. 166.
Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.
Best v. *Doe*, 85 U. S. 112.

Heckman v. *United States*, 224 U. S. 413, 446.
Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.
Mullen v. *Simmons*, 234 U. S. 192, 198.
Franklin v. *Lynch*, 233 U. S. 269.
Northern Pacific R. Co. v. *U. S.*, 227 U. S. 355.

XLVIII.

If the United States is to be considered as Trustee for the Indians in their title to the land, then the rule applies that an agent or representative or official of a government cannot deprive it of property by taking its lands and having streets and highways thereon, or in other respect bind the government as to such lands.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.
United States v. *Chicago*, 48 U. S. 185.
I. C. R. R. Co. v. *Illinois*, 146 U. S. 387.
United States v. *Morrison*, 203 Fed. 364.
Stone v. *United States*, 2 Wall. 525.
United States v. *Carpenter*, 111 U. S. 347.

XLIX.

A sole exception to the absolute right to soil in the Indians, even independently of the Treaty of Greenville, was that imposed by irresistible power which excluded them from intercourse with any other European potentate, and imposed restrictions upon alienation of their land accordingly.

Worcester v. *Georgia*, 6 Pet. 515, 559.

L.

"In the record of judicial determinations of this court there are few decisions of greater importance than those which were pronounced in *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *Worcester* v. *Georgia,* 5 Pet. 515."

United States v. *Lariviere* (43 Gals. of Whisky), 93 U. S. 188.

LI.

The validity of a legislative act including treaties, depends in no degree on its containing the technical terms used in a conveyance.

Rutherford v. *Greene's Heirs,* 2 Wheat. 196, 198.

New York Indians v. *United States,* 170 U. S. 1, 16.

LII.

The *habendum* clause of a grant in a treaty as well as of a deed may explain, enlarge or qualify but cannot contradict or defeat the estate granted by the premises.

New York Indians v. *United States,* 170 U. S. 1, 20.

Worcester v. *Georgia,* 6 Pet. 515, 553.

2 Kappler, 41, 42.

LIII.

Title to the lands in question by the defendants, or any of them, directly or indirectly, could only have been acquired either from the United States or from

the State of Illinois. If the United States ever had any title prior to the admission of Illinois as a State, then that title passed to the State upon its admission. The only cession which had at that time been made by the Indians was the one by the Treaty of St. Louis in 1816, which, by its language and the survey made under it (reproduced in the record as page 35 and shown between pages 18 and 19 of the abstract) ran to the shore of Lake Michigan only. As the State upon its admission took only the title of the United States and has acquired none since then, it follows that the State could give no title to any of the defendants.

Illinois Cent. R. R. Co. v. *Illinois*, 146 U. S. 387.

Knight v. *United States Land Associations*, 142 U. S. 161, 185.

Shively v. *Bowlby*, 152 U. S. 1.

United States v. *Winans*, 198 U. S. 371, 382.

LIV.

There can be no claim of title upon the theory of abandonment. Affirmative action is required on the part of the Indians and also a legislative or judicial proceeding in the nature of an inquest of office to constitute an abandonment of title. Mere failure to assert title is not sufficient.

Mitchel v. *United States*, 9 Pet. 711, 742, 743, 749.

The New York Indians v. *United States*, 170 U. S. 1, 20.

Schulenberg v. *Harriman*, 88 U. S. 44.

Van Wyck v. *Knevals*, 106 U. S. 360.

Saint Louis, etc. Ry. Co. v. *McGee*, 115 U. S. 469.

Rowland & Heifner v. *Ladiga's Heirs*, 2 Ala. 9.

Indian Land Cessions, pp. 535, 539.

LV.

At least, cessation of occupancy must be in pursuance to agreemnet of cession to constitute abandonment.

Buttz v. *Northern Pac. R. R. Co.*, 119 U. S. 55.

LVI.

The claim of the defendants that the Indians parted with their title by the Treaty of Tippecanoe River of October 27, 1832, is not tenable. That Treaty, in conceding to the United States "their title and interest to lands in the States of Indiana, Illinois and in the Territory of Michigan *south of the Grand River,*" did not cede the lands in question. Millions of acres were still ceded by the Treaty of Chicago of September 26-27, 1833 (2 Kappler's Ind. Aff. 402.) What was ceded in the former treaty was the interest of the particular Bands to the lands ceded on the day previous by the other chiefs of the Pottawatomie Nation (2 Kappler's Ind. Aff. 367) and did not include the lands in question. Otherwise this cession would be void for uncertainty, as it is not by metes and bounds and does not state that *all* the lands in those states were ceded.

3 Washburn Real Prop., 622.

Hughes v. *Streeter*, 24 Ill. 648, 650.

U. S. v. *Heirs of Arredondo*, 13 Pet. 133, 135.

LVII.

The Government is bound to carry out the obligations of a treaty with the Indians in the same manner as an individual would be bound.

Crews v. *Burcham*, 1 Black, 352.
United States v. *Reese*, 5 Dill. 409, Fed. Cs. 16-137.
Choate v. *Trapp*, 224 U. S. 665, 674.

LVIII.

A court cannot amend a treaty by construction from general notions of convenience, etc.

The Amiable Isabella, 6 Wheat. 1.
Lattimer v. *Poteet*, 14 Pet. 4.
Society, etc. v. *New Haven*, 8 Wheat. 464.
Strother v. *Lucas*, 12 Pet. 410.
Chew Heong v. *United States*, 112 U. S. 536.
Tucker v. *Alexandroff*, 183 U. S. 424.

LIX.

Even treating the Indian title as one of permanent occupancy that title is superior to the title of the Government and limits necessarily its power of disposal.

Barker v. *Harvey*, 181 U. S. 481.
The New York Indians v. *United States*, 170 U. S. 1, 20.
United States v. *Joseph*, 94 U. S. 614.

Even the right of occupancy can be extinguished only by voluntary cession to the government.

U. S. v. *Lariviere* (43 Gals. of Whiskey), 93 U. S. 188.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.
Buttz v. *Northern Pacific R. R. Co.*, 119 U. S. 55.

LX.

It is not enough that the complainants' ancestors had removed from the vicinity of the lands in question. Their removal without sale does not affect their title.

Fellows v. *Denniston*, 5 Wall. 761.
New York v. *Dibble*, 21 How. 366.
United States v. 43 *Gals. of Whiskey*, 93 U. S. (3 Otto), 188.
Choate v. *Trapp*, 224 U. S. 665, 678.
Cherokee Tobacco v. *United States*, 78 U. S. 616.

LXI.

The relation of guardian and ward which the United States government holds toward the Indians, does not confer upon it or upon Congress the right to confiscate Indian property, and such property is protected by the Fifth Amendment to the Constitution.

Choate v. *Trapp*, 224 U. S. 665, 678.

LXII.

If the Pottawatomie Nation be considered to have taken the land in question from the United States under the Greenville treaty, conditioned upon their "hunting and dwelling thereon," their ceasing to "hunt and dwell" thereon, if at all applicable to the

then submerged land, would constitute a condition subsequent, and as such, could be set up only by the grantor, the United States, and which the United States may waive.

Holden v. *Joy*, 84 U. S. (17 Wall.) 211.

See, also:

Buttz v. *N. P. R. R. Co.*, 119 U. S. 55.
Beecher v. *Wetherby*, 95 U. S. 517.
Schulenberg v. *Harriman*, 88 U. S. 44.
St. Louis, etc. Ry. Co. v. *McGee*, 115 U. S. 469.

LXIII.

A patent is not required to perfect a title given by a treaty.

Best v. *Doe*, 85 U. S. 112.

XLIV.

The courts of the United States will take judicial notice of treaties, public records, documents, etc.

Heath v. *Wallace*, 138 U. S. 573, 584.
New York Indians v. *United States*, 170 U. S. 1, 32.
Jones v. *United States*, 137 U. S. 202, 214.

XLV.

A suit is properly brought by a chief and tribal officers or respective members of a tribe or nation on behalf of an Indian Nation or tribe.

Cherokee Nation v. *Hitchcock*, 187 U. S. 307.
Lone Wolf v. *Hitchcock*, 187 U. S. 553.
United States v. *Old Settlers*, 148 U. S. 427.

This method is sustained partly to prevent a multiplicity of suits, *ibid.*

United States v. *Cherokee Nation*, 202 U. S. 101.

United States v. *Old Settlers*, 148 U. S. 427.

Smith v. *Swormstedt*, 57 U. S. (16 How.) 288, 302, 303.

LXVI.

The jurisdiction of a court of equity is sustained in a suit to prevent a cloud upon the title of an Indian tribe.

Lone Wolf v. *Hitchcock*, 187 U. S. 553, 560.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 295, 307.

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Heckman v. *United States*, 224 U. S. 413.

United States v. *Rickert*, 188 U. S. 432, 444.

United States v. *Cherokee Nation*, 202 U. S. 101, 126.

United States v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. Rep. 886, 890.

Kilbourn v. *Sunderland*, 130 U. S. 505.

Northern Pac. R. Co. v. *Smith*, 171 U. S. 260, 271, *et seq.*

United States v. *Old Settlers*, 148 U. S. 427.

Pam-To-Pee v. *United States*, 148 U. S. 691.

Kansas Indians, 5 Wall. 737.

Yellow Beaver v. *Commrs.*, 5 Wall. 757.

Wan-zop-e-ah v. *Commrs.*, 5 Wall. 759.

New York v. *Dibble*, 21 How. 366, 371.

LXVII.

Even if a question of whether or not the complainants are under tribal organization would affect their right to bring suit, that question is one, not for the courts, but for the Government; the tribal existence is alleged as a fact and cannot be questioned on demurrer, or a motion to dismiss, which is the equivalent of a demurrer.

The Kansas Indians, 5 Wall. 737.

United States v. *Holliday*, 3 Wall. 407, 419.

Brown v. *Steele*, 23 Kas. 530.

LXVIII.

It does not seem necessary to give status of tribal Indians that they reside upon common territory or that their lands shall be coterminous.

Ne-Hung-Go-Ne-Sia v. *State*, 36 Ind. 310, 316.

LXIX.

Bringing suit against numerous defendants to protect Indian title to lands is not multifarious.

Heckman v. *United States*, 224 U. S. 413, 448.

United States v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. 886, 887.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 300.

Equity Rule No. 38.

Choate v. *Trapp*, 224 U. S. 665.

LXX.

Jurisdiction in equity attaches unless the legal remedy both in respect to the final relief and the mode of obtaining it is as efficient as the remedy which equity would confer under the same circumstances.

Kilbourn v. *Sunderland*, 130 U. S. 505.
United States v. *Flournoy, etc. Co.*, 69 Fed. 886, 890.
Lancaster v. *Kathleen Oil Co.*, 241 U. S. 531.

LXXI.

Continued trespasses on real estate are grounds for injunction.

Evans v. *Victor*, 204 Fed. 361, 371.

LXXII.

A case arising from or growing out of a treaty is one involving rights given or protected by a treaty.

United States v. *Old Settlers*, 148 U. S. 427, 469.

LXXIII.

If in a suit in equity a matter ordinarily determinable at law arises such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court.

Equity Rule No. 23.

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court one or more may sue or defend for the whole.

Equity Rule No. 38.

LXXIV.

Where the United States is not interested it is not a necessary party.

Hy-Yu-Tse-Mil-Kin v. *Smith*, 194 U. S. 401.
Heckman v. *United States*, 224 U. S. 413, 442, 446.

LXXV.

Those asserting title to land belonging to or occupied by an Indian tribe are not entitled to a jury trial under the Constitution.

New York v. *Dibble*, 21 How. 366.

ARGUMENT.

I.

THE PRIMARY TITLE TO THE COUNTRY KNOWN TO HISTORY AS THE NORTHWEST TERRITORY, WHATEVER THE NATURE OF THAT TITLE, WAS IN THE INDIANS.

That the primary title to the country known as the Northwest Territory antedated that of either the United States or Great Britain, or, for that matter, of France, and was in some nation or nations of Indians, will, we presume, readily be granted.

Mr. Cyrus Thomas, the able and scholarly author of the introduction to "Indian Land Cessions," states (p. 535) that in its dealings with the Indians "the United States has proceeded on the theory that *all* the land was held by natives." (Italics are in the original text.) As early as July 19, 1701, Great Britain formally recognized that title by making a treaty with the "Five Nations" in which the Indians ceded "the said tract of land or Colony, *lakes* and *rivers* and premises and every part and parcell thereof with their and every of their appurtenances unto our souveraigne Lord the King William the third," etc. (Indian Land Cessions, p. 553). The author then goes on to say "this was confirmed twenty-five years later by a substantial renewal of the deed, but limited in extent and made in the form of a trust, the granting clause being as follows: * * *

'And we Do allso of our own Accord free and Voluntary will Give Render Submit and Grant

> and by these presents do for our Selves our heirs & Successors Give Render Submit and Grant unto Our Said Sovereign Lord King George his heirs and Successors for Ever all that Land' (describing land conveyed). 'Including all the Castles of the aforesaid Three nations *with all the Rivers Creeks and Lakes* within the Said Limits,' etc." (p. 554).

The boundaries of this cession are shown on "Mitchell's Map," elsewhere referred to in this brief as being the map officially recognized as correct by both the British and American Governments. Part of this boundary runs *through Lake Michigan,* a few miles from its eastern shore, and runs out at the southern extremity at a point called "Quadoghe," also noted as "Bottom of the Lake," (the present site of Michigan City). Under the name "Quadoghe" appears the notation "so call'd by ye Six nations, ye extent of their territories, & Bounds of their Deed of Sale to ye Crown of Britain 1701, renewed in 1726 and 1744." This line is marked on the map "Western bounds of the Six Nations sold and surrendered to Great Britain." It is thus seen, both by the language of the cessions and by the official map, that Great Britain had not even *claimed* ownership of any kind to the lands in controversy in the present suit, but its claim was apparently a species of "Sphere of Influence."

Then Mr. Thomas goes on to say:

> "Although these cessions were made by the Indians solely for the purpose of placing themselves under the sovereignty and protection of the English Government, attempts were afterwards made to construe them as an absolute transfer of the Indian title, and grants were

made by the authorities for tracts in said territory. *This claim, however, was abandoned.*"

* * * * * *

"It appears by a report of the Lords of Trade, read before the Council at the Court of St. James November 23, 1761, and approved, the King being present, that the Government had at last been aroused to the necessity of paying regard to the Indians' rights, as shown by the following quotation therefrom: * * *

" 'It will be sufficient for the present purpose to observe that the primary cause of that discontent which produced these fatal Effects was the Cruelty and Injustice with which they had been treated with respect to their hunting grounds, in open violation of those solemn compacts by which they had yielded to us the Dominion, but *not the property* of those Lands.' "

On page 640 of the same work, Mr. Thomas, in commenting on the policy of the United States toward the Indians, says:

"By the proclamation of September 22, 1783, all persons were prohibited 'from making settlements on lands inhabited or claimed by Indians without the limits or jurisdiction of any particular state, and from purchasing or receiving any gift or cession of such lands or claims without the express authority and direction of the United States in Congress assembled.' *It will be seen from this that the prohibition was not limited to lands in the actual use and possession of and occupied by the Indians, but extended to that claimed by them.*"

In *Northern Pacific Railway Company* v. *United States,* 227 U. S. 355, 366, Mr. Justice McKenna states in the opinion of the court, speaking of a cession of land not in question here:

"It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians."

The following was given as the finding of facts in *Johnson* v. *M'Intosh*, 8 Wheat. 543, 547:

"That at and before the commencement of the war in 1756, and during its whole continuance, and at the time of the treaty of February 10th, 1763, the Indian tribes or nations, inhabiting the country north and northwest of the Ohio, and east of the Mississippi, as far east as the river falling into the Ohio called the Great Miami, were called and known by the name of the Western Confederacy of Indians, and were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty, and the right of soil, except a few military posts, and a small territory around each, which they had ceded to France, and she held under them, and among which were the aforesaid posts of Kaskaskias and Vincennes; and that these Indians, after the treaty became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property; the territories of the respective tribes being separated from each other, and distinguished by certain natural marks and boundaries to the Indians well known; and each tribe claiming and exercising separate and absolute ownership, in and over its own territory, both as to the right of sovereignty and jurisdiction, and the right of soil."

This case is frequently cited as establishing the doctrine that the Indian title is merely the perpetual right of occupancy or of possession. While if that be the nature of the title to the lands in question, this bill must be sustained, for that perpetual right has manifestly not yet expired, still, as we shall point out elsewhere in this brief, the doctrine of the *M'Intosh* case in this respect has no application to the case at bar. The Greenville Treaty has added the full Government title to that of the Indians, and, as we shall show elsewhere, left the Indians with an unqualified fee simple title, subject only to the restriction that the Indians may not convey to any one but the United States. The courts cannot go behind the Greenville Treaty.

Fellows v. *Blacksmith,* 19 How. 366.

In *Worcester* v. *Georgia,* 6 Pet. 515, 544, 545, it was said:

> "The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood."

Practically the entire opinion in this case is highly instructive on this point. Speaking of this case,

Justice Davis said [*United States* v. *Lariviere* (43 Gals. of Whisky), 93 U. S. 188]:

> "In the record of judicial determinations of this court there are few decisions of greater interest and importance."

> "So far as respected the authority of the crown, *no distinction was taken between vacant lands and lands occupied by the Indians.*"
>
> *Johnson* v. *M'Intosh*, 8 Wheat. 543, 596.

As there was no distinction between lands occupied and unoccupied, neither could there have been any distinction between islands, submerged lands and uplands.

Whatever title has passed to the Government is derived through the cession from the Indians.

Barker v. *Harvey*, 181 U. S. 481.

See, also:

Mitchel v. *United States*, 9 Pet. 711, 754 *et seq.*

United States v. *Joseph*, 94 U. S. 614.

II.

THIS TITLE INCLUDED LAKES AND RIVERS AND THEIR ISLANDS AND THE SUBMERGED LANDS AS WELL AS THE UPLAND.

Much of what is said under point I will be suitable to this proposition. That the Government has repeatedly recognized the Indian rights to the lakes and rivers as well as to the uplands, will appear more fully hereafter. It is sufficient to note at this time that this construction was manifested by numerous cessions from the Indians to the Government of

other parts of Lake Michigan and of parts of all the other Great Lakes in what was formerly known as the Northwest Territory. See Point VIII, *post.*

See also *Winters* v. *United States,* 207 U. S. 564.

In the Treaty of Greenville of August 3, 1795, Article Four, the language of cession of relinquishment from the United States to the Indians is defined to be "*according to the boundary line agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year* 1783."

2 Kappler Indian Affairs, 41.

This boundary line ran through the middle of Lakes Ontario, Erie, Huron and Superior, and the treaty left all of Lake Michigan to the Indians.

When territory is transferred from one government to another, the private right in tide lands as fixed by the rules of the former government will be respected by the new one.

Knight v. *United Land Association,* 142 U. S. 161.

San Francisco v. *LeRoy,* 138 U. S. 656.

We call attention to a report by Mr. Knox, Secretary of War, to President Washington, dated June 15, 1789, relative to the Northwestern Indians (American State Papers, Class II, Vol. I, "Indian Affairs," page 13):

> "*The Indians being the prior occupants, possess the right of the soil.* * * * Congress were of opinion that the treaty of peace of 1783 absolutely intended that with the fee of all the Indian lands within the limits of the U. S.; that they had a right to assign or retain such portions as they should judge proper. But it

> is manifest from the representations of the confederated Indians at the Huron village in December, 1786, that they entertained a different opinion, and that they were the only rightful proprietors of the soil."

To the same effect in his report of July 7, 1789 (p. 53).

On January 4, 1790, the secretary reported to the president (p. 61):

> "Were it enacted that the Indians possess the right to all their territory which they have not fairly conveyed and that they should not be divested thereof, but in consequence of open treaties made under the authority of the U. S. the foundation of peace and justice would be laid"; and again: "By the directions of Congress of the 2nd of July, 1788, to the governor of the Western territory to extinguish the Indian claims to lands they had ceded to the U. S. and to obtain regular conveyances of the same, it would appear, that *they conceded the Indian to the soil.*"

The defendants, however, contend that since the Treaty of Greenville describes the cession from the United States to the Indians as being (2 Kappler, 41): "all other Indian lands northward of the River Ohio, eastward of the Mississippi, and *westward and southward of the Great Lakes and the waters uniting them*, according to the boundary line agreed on by the United States and the king of Great Britain in the treaty of peace made between them in the year 1783," that the Great Lakes and the waters uniting them are thereby excluded from the relinquishment. Yet Gen. Anthony Wayne, known to historical fame as "Mad Anthony," in a

speech to the Indians, while negotiating the Treaty, on July 24, 1795, stated to them, after reading to them from the British American peace treaty of 1783:

> "There you perceive that all the country *south of the Great Lakes* has been given up to America." (American State Papers, Class R, relating to Indian Affairs, Vol. 1, p. 573.)

Did General Wayne mean thereby to tell the Indians that no part of the lakes had been "given up to America"?

Again on July 27, 1795, Gen. Wayne said to the Indians (same Volume, p. 574):

> "The British * * * ceded all the posts and possessions they then held or to which they had any claim, *south of the Great Lakes*, to the United States."

In explaining the Treaty to the Indians (2 Kappler, 39), he said:

> "I wish you clearly to understand the object of these reservations; they are not intended to annoy or impose the smallest degree of restraint on you in the quiet enjoyment and full possession of your lands."

Is it not evident that Gen. Wayne resorted to the plainest language that he could use which would be intelligible to the Indians that what was left to them was in fee simple absolute, including the lakes?

By the light of these speeches of Gen. Wayne to the Indians, it is evident that by the terms of parti- intended to express that the United States government relinquished to the Indians the entire title of the United States to all the land and water in the

Northwest Territory as fully as Great Britain had previously relinquished the same to the United States, excepting only what was expressly ceded to the United States. The only proviso to this relinquishment is the restriction against alienation.

III.

THE TREATY OF CESSION OF 1783 WHEREBY THE COUNTRY WAS CEDED BY GREAT BRITAIN TO THE UNITED STATES, CONVEYED MERELY WHATEVER CLAIM OR TITLE GREAT BRITAIN HAD, AND WAS SUBJECT TO THAT OF THE INDIANS. IN OTHER WORDS, THE UNITED STATES ACQUIRED NO GREATER TITLE THAN GREAT BRITAIN HAD BEFORE THAT.

The Treaty of Peace between the United States and Great Britain concluded in 1783 contains the following language of cession:

> "His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantation, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to be free, sovereign and Independent states; that he treats with them as such and for himself, his Heirs & Successors *relinquishes* all claims to the Government Proprietary and Territorial Rights of the same & every Part thereof."

The boundary line agreed on in this Treaty, as is well known, runs through the middle of Lakes Ontario, Erie, Huron and Superior as well as their connecting waters. By the very language of the Treaty, and as repeatedly held by the Supreme

Court, the conveyance of Great Britain merely amounted to a quit-claim, and the United States took no greater title than Great Britain had.

Chief Justice Marshall, in speaking of the relation of the Cherokee Nation with the United States, said in *Worcester* v. *Georgia*, 6 Pet. 515, 544, 555:

> "The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. * * * They assumed the relation with the United States which had before subsisted with Great Britain."

In *Johnson* v. *M'Intosh*, 8 Wheat. 543, 584, Chief Justice Marshall said:

> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitely to these states. We had before taken possession of them, by declaring independence; *but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled.*"

In *United States* v. *Percheman*, 7 Pet. 51, 86, Chief Justice Marshall said:

> "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt

by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled."

In *Michel* v. *United States*, 9 Pet. 711, 734, 749, 754, 756, Mr. Justice Baldwin said:

"A treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. * * *

"By thus holding treaties with these Indians, *accepting of cessions from them with reservations, and establishing boundaries with them,* the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties. * * *

"When they acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognized as being under his protection. They could assume no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; nor did they take possession on any such assumption of right; on the contrary, it was done under the guaranty of Congress to the inhabitaants, without distinction,

of their rights of property, and with the continued assurance of protection. * * *

"On these considerations, we are clearly of the opinion that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them which could not be impaired without a violation of the laws of both and the sanctity of repeated treaties."

In *Strother* v. *Lucas,* 12 Pet. 410, 435, Justice Baldwin said:

"The State in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the Treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it (2 Peters, 301, &c.), by which this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants."

In *Wilson* v. *Wall,* 6 Wall. 83, the court said:

"When the United States acquired and took possession of the Floridas under the Louisiana Treaty, the treaties which had been made with the Indian Tribes remained in force over all the ceded territories as the laws which regulate the relations with all the Indians who were parties to them. They were binding on the United States as the fundamental laws of Indian right, acknowledged by royal orders and municipal regulations."

In *Holden* v. *Joy,* 84 U. S. (17 Wall.), 211, this court said:

"Unmistakably their (the Indians') title was *absolute,* subject only to the preemption right of purchase acquired by the United States as the

> successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs."

And in *Francis* v. *Francis*, 203 U. S. 233, 239:

> "The Indian title to the land reserved did not pass to the United States by the treaty, which operated as a release, by both the Indians and the government, of all interest either had in the lands reserved to the respective reservees, *in fee simple;* and it would be a violation of the treaty for the government to claim the land in question.

The conclusion is therefore irresistible that even independently of the Greenville treaty, the Indians had the full title and the United States only the ultimate right of purchase acquired from Great Britain.

IV.

THE SO-CALLED GREENVILLE TREATY OF AUGUST 3, 1795, BETWEEN THE UNITED STATES AND THE TWELVE INDIAN NATIONS OR TRIBES OF THE NORTHWEST TERRITORY, WAS FOR PRACTICAL PURPOSES A DEED IN PARTITION; AND EACH PARTY TO THE PARTITION TOOK AN ABSOLUTE FEE SIMPLE TITLE IN THE PART DEEDED TO IT.

Article Three of the Greenville Treaty reads as follows:

> "The general boundary line between the lands of the United States, and the lands of the said Indian tribes, shall begin at the mouth of Cayahoga river, and run thence," etc., and "the said Indian tribes do hereby cede and relinquish forever, all their claims to the lands lying eastwardly and southwardly of the general boundary line now described."

This boundary line may be noted by inspection of the Map of Cessions in Ohio (Map 49) of Indian Land Cessions. The cession in question is No. 11.

The Indians also cede sixteen smaller pieces from the part reserved to them by the Treaty and four additional exceptions are made in Article Four of the Treaty. None of these reservations, however, includes the lands in question. The language of cession from the United States to the Indians in Article Four of that Treaty is as follows:

> "The United States *relinquish their claims* to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, *according to the boundary line agreed on by the United States and the king of Great Britain, in the treaty of peace made between them in the year* 1783."

It will be noted that the language of cession from the United States is by the use of the word "relinquish," being the identical expression used in the treaty of cession from Great Britain to the United States. Even if the Indians had had no title before, they would have by this treaty succeeded to the title of the United States, as the latter had to that of Great Britain. It is seen that each of the parties to that treaty, after describing the boundary line between their respective lands, parted with all title in the part ceded or relinquished. This relinquishment, therefore, plainly leaves in the Indians a fee simple title to the lands reserved to them, unless some qualifying words are elsewhere found in the treaty to detract from the full force and effect of a fee simple title, and the precise nature of the In-

dian title prior to that treaty becomes wholly immaterial. Such qualifying words it is claimed appear in Article Five of this treaty, which is as follows (2 Kappler Indian Affairs, p. 42):

> "To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, *they are to be sold only to the United States; and until such sale,* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever."

The first qualifying expression it is claimed consists in the following expression: "The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States." The first impression is not that these are words of limitation or derogation from the full grant, but are by way of a covenant of quiet enjoyment, of merely putting the habendum clause of a warranty deed into untechnical language. This first impression is not altered by any amount of research of the authorities. Thus, in *Worcester* v. *Georgia,* 6 Pet. 515, 553, Chief Justice Marshall says:

> "With respect to the words 'hunting grounds,' hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved. * * * These terms had been used in their treaties with Great Britain, and had never been misunderstood. *They had never been supposed to imply a right in the British government to take their lands,*" etc.

The validity of a legislative act including treaties depends in no degree on its containing the technical terms used in a conveyance.

> *Rutherford* v. *Greene's Heirs,* 2 Wheat. 196.
> *New York Indians* v. *United States,* 170 U. S. 1, 16.

The habendum clause in a treaty as well as in a deed, may explain, enlarge or qualify, but cannot contradict or defeat the estate granted by the premises.

> *New York Indians* v. *United States,* 170 U. S. 1, 20.

The language used in treaties with the Indians should never be construed to their prejudice.

> *Worcester* v. *Georgia,* 6 Pet. 515, 582.

In *Libby* v. *Clark,* 118 U. S. 250, Mr. Justice Miller said:

> "The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. *The restriction on his right to convey did not deprive*

the title of the character of a fee simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.'"

In *Winters* v. *United States,* 207 U. S. 564, 576, Mr. Justice McKenna said:

"By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

In *Jones* v. *Meehan,* 175 U. S. 1, 10, 11, 12, it was said by the court:

"In construing any treaty between the United States and an Indian Tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expres-

> sion, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people.

The Kansas Indians, 5 Wall. 737.

The court, in *Choctaw Nation* v. *United States,* 119 U. S. 1, said:

> "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.
>
> "The rules to be applied in the present case are those which govern public treaties, which, *even in case of controversies between nations*

equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

In *Choate* v. *Trapp*, 224 U. S. 665, 675, Mr. Justice Lamar, in his opinion, said:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years."

See also:

N. P. R. Co. v. *United States*, 227 U. S. 355, 366, 367.

United States v. *Rickert*, 188 U. S. 432.

"As will be seen when allusion is made to the policy of the nations in their dealings with the Indians there was some difference in regard to the extent of their right or title. This was limited by some of the governments to the territory occupied, while by others, as the United States, *it was usually allowed to extend to the territory claimed*, where the boundaries between the different tribes were understood and agreed on. It would seem, in fact, that the United States proceeded on the theory that *all* the land was held by natives."

Indian Land Cessions, p. 535.

This last statement is of course entirely incompatible with the idea of the Indian title being merely one of *pedis possessio*.

A claim is made further that the restriction upon alienation contained in this Article operates to limit or destroy the fee simple character of the title "relinquished." The holdings by this court have been uniformly the other way.

In *Francis* v. *Francis,* 203 U. S. 233, 239, Justice Harlan said:

> "The Indian title to the land reserved did not pass to the United States by the treaty, which operated as a release, by both the Indians and the government, of all interest either had in the lands reserved to the respective reservees, *in fee simple;* and it would be a violation of the treaty for the government to claim the land in question."

In *United States* v. *Paine Lumber Co.,* 206 U. S. 467, 473, Mr. Justice McKenna said:

> *"The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple,"*

citing *Libby* v. *Clark,* 118 U. S. 250. In the latter case it was said:

> "The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended, to his heirs. *The restriction on his right to convey did not deprive the title of the character of a fee simple estate.* 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.'"

It is plain, therefore, that, upon the execution of the Greenville treaty, the title to the lands in question was in the Indians, in fee simple.

V.

AS BETWEEN THE TWELVE INDIAN NATIONS WHO WERE PARTY TO THE GREENVILLE TREATY, THE LAND WAS HELD IN SEVERALTY BY THE RESPECTIVE NATIONS; AND THE LAND IN QUESTION WAS THE PROPERTY OF THE UNITED NATION OF OTTAWAS, CHIPPEWAS AND POTTAWATOMIES, USUALLY REFERRED TO AS THE POTTAWATOMIE TRIBE OR NATION.

In the article on Pottawatomies in Bulletin 30, Vol. 2, of "Smithsonian Institute Bureau of American Ethnology," is the following:

> "They (the Pottawatomies) were then moving southward and by the close of the seventeenth century established themselves on Milwaukee River at Chicago and on St. Joseph River, mostly in territory that had previously been held by the Miami By the beginning of the nineteenth century they were in possession of the country around the head of Lake Michigan, from Milwaukee River in Wisconsin to Grand River in Michigan, extending southwest over a large part of northern Illinois across Michigan to Lake Erie and south in Indiana to the Wabash, and as far down as Pine Creek."

As a matter of fact, the United States recognized the Pottawatomie title to all the lands bordering on Lake Michigan, described in the above Article, by taking cessions from the Pottawatomies or the United Nation of Ottawas, Chippewas and Pottawatomies. See the following Treaties:

Treaty of St. Louis of August 24, 1816, 2 Kappler Indian Affairs, p. 132.

First Treaty of Chicago of August 29, 1821, *ibid.* p. 198.

Treaty of the Wabash of October 16, 1826, *ibid.* p. 273.

Treaty of St. Joseph of September 20, 1828, ibid. p. 294.

Treaty of Camp Tippecanoe of October 20, 1832, *ibid.* p. 353.

Treaties of Tippecanoe River of October 26-27, 1832, *ibid.* pp. 367, 372.

Second Treaty of Chicago of September 26, 1833, *ibid.* p. 402.

All these cessions, however, it should be incidentally noted, extend to the shore of Lake Michigan only.

In *Doe* v. *Wilson,* 64 U. S. (23 How.) 457, it was said:

> "The Pottawatomie nation was the owner of the possessory right of the country ceded, and all of the subjects of the nation were joint owners of it."

See also *Pam-To-Pee* v. *United States,* 148 U. S. 691.

The Greenville treaty left the title, therefore, in the Pottawatomies, the complainant nation.

VI.

PRIOR TO 1871 THERE WAS NO WAY OF EXTINGUISHING THE TITLE TO ANY INDIAN LAND EXCEPT BY CONQUEST OR BY VOLUNTARY CESSION FROM THE INDIANS TO THE GOVERNMENT.

> "The utmost good faith shall always be observed toward the Indians. Their lands and properties shall never be taken from them without their consent; and in their property rights

and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress."

Article Three, Ordinances of 1787.

"But when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and *until such sale,* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands," etc.

2 Kappler Indian Affairs, p. 42.

"It is admitted that these Pembina Indians had the same right as other tribes to occupy their lands as long as they pleased, and that this right of occupancy could only be extinguished by voluntary cession to the Government."

United States v. 43 *Gals. of Whiskey,* 93 U. S. 188.

"According to the Annual Report of the Commissioner of Indian Affairs for 1890 (page xxix), 'From the execution of the first treaty made between the United States and the Indian tribes residing within its limits (September 17, 1778, with the Delawares) to the adoption of the act of March 3, 1871, that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," the United States has pursued a uniform course of extinguishing the Indian title only with the consent of those tribes which were recognized as having claim to the soil by reason of occupancy, such consent being expressed in treaties. * * * *Except only in the case of the Sioux Indians in Minnesota, after the outbreak of* 1862, *the Government has never extinguished an Indian title as by right of conquest; and in this case the Indians were pro-*

vided with another reservation, and subsequently were paid the net proceeds arising from the sale of the land vacated."

Indian Land Cessions, 640.

It is not enough that complainants' ancestors had removed from the vicinity of the lands in question. Their removal without sale does not affect their title.

Fellows v. *Denniston*, 5 Wall. 761.
New York v. *Dibble*, 21 How. 366.

VII.

ALL THE CESSIONS BY THE POTTAWATOMIE NATIONS OF ILLINOIS LANDS BORDERING ON LAKE MICHIGAN RUN TO THE SHORE OF THE LAKE ONLY, AND DO NOT INCLUDE ANY ISLANDS NOR ANY PART OF THE BED OF THE LAKE.

Following are the cessions and all the cessions by Indians of lands in Illinois bordering on Lake Michigan; all these cessions running to the shore of the lake only and including no part of the then submerged lands:

a. The Treaty of St. Louis of August 24, 1816, (2 Kappler 132) has the following language of cession:

> "The said chiefs and warriors, for themselves and the tribes they represent, agree to relinquish, and hereby do relinquish, to the United States, all their right, claim and title, to all the land contained in the before-mentioned cession of the Sacs and Foxes, which lies south of a due west line from the southern extremity of Lake Michigan to the Mississippi river. And they moreover cede to the United States all the land contained *within the following bounds*, to wit: beginning on the left bank of the Fox river of Illinois, ten miles above the mouth of said

Fox river; thence running so as to cross Sandy creek, ten miles above its mouth; thence, in a direct line, to a point ten miles north of the west end of the Portage, between Chicago creek, which empties into Lake Michigan, and the river Depleines, a fork of the Illinois; thence, in a direct line, *to a point on Lake Michigan, ten miles northward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of the said Chicago creek;* thence, in a direct line, to a point on the Kankakee, ten miles above its mouth; thence, with the said Kankakee and the Illinois river, to the mouth of Fox river, and thence to the beginning." This cession includes the site of Chicago.

b. The Treaty with the Chippewas, Ottawa and Pottawatomie Indians of the waters of Illinois, Milwaukee, and Minitoouck Rivers concluded at Prairie du Chien, in the territory of Michigan on July 29, 1829, in which is ceded:

"Beginning on the Western Shore of Lake Michigan, at the northeast corner of the field of Antoine Ouimette, who lives near Gross Pointe, about twelve miles north of Chicago; thence, running due west, to the Rock River, aforesaid; thence, down the said river, to where a line drawn due west from the most southern bend of Lake Michigan crosses said river; thence, east, along said line, to the Fox River of the Illinois; thence, along the northwestern boundary line of the cession of 1816, to Lake Michigan; thence, northwardly, *along the Western shore of said Lake, to the place of beginning.*" (2 Kappler 297.)

This cession is shown as No. 148, on map marked "Illinois 2."

c. The Treaty with the Chippewa, Ottawas and Pottawatomies at Chicago on the 26th day of Sep-

tember, 1833, in which the following was the cession to the United States (2 Kappler 402):

> "Article 1st.—The said United Nation of Chippewa, Ottawa, and Potawatomie Indians, cede to the United States all their land, *along the western shore of Lake Michigan,* and between this Lake and the land ceded to the United States by the Winnebago nation, at the treaty of Fort Armstrong made on the 15th, September 1832—bounded on the north by the country lately ceded by the Menominees, and on the south by the country ceded at the treaty of Prairie du Chien made on the 29th of July, 1829—supposed to contain about five millions of acres." (Cession 187, Maps "Illinois 2," "Wisconsin 1.")

d. The Treaty with the Pottawatomies at Camp Tippecanoe, October 20, 1832, in which the following cessions were made to the United States (2 Kappler, 353):

> "Article 1. The said Potawatomie Tribe of Indians cede to the United States the tract of land included *within the following boundary,* viz:
>
> Beginning at a point on Lake Michigan ten miles southward of the mouth of Chicago river, thence, in a direct line, to a point on the Kankakee river, ten miles above its mouth; thence, with said river and the Illinois river, to the mouth of Fox river, being the boundary of a cession made by them in 1816; thence, with the southern boundary of the Indian Territory, to the State line between Illinois and Indiana; thence, north with said line, *to Lake Michigan; thence, with the shore of Lake Michigan,* to the place of beginning." (Cession 177, Map "Illinois 1.")

VIII.

THAT BY THE INDIAN CESSIONS OF THE ILLINOIS UPLANDS BORDERING ON LAKE MICHIGAN IT WAS NOT INTENDED TO INCLUDE THE ISLANDS OR ANY PART OF THE BED OF THE LAKE IS SHOWN BY THE FACT THAT THE CESSIONS OF LANDS IN THE NORTHWEST TERRITORY BORDERING ON OTHER PARTS OF LAKE MICHIGAN AND THE OTHER GREAT LAKES EXPRESSLY INCLUDED PARTS OF THE LAKES AND THE ISLANDS, AND BOUNDARIES OF THE CESSIONS WERE RUN INTO AND ACROSS THE LAKES AS WELL AS THE UPLANDS.

There is first the general rule of construction of Indian cessions to the United States that everything is reserved that is not expressly ceded by the Indians, and this applies to water as well as land.

Winters v. *United States,* 207 U. S. 564.
U. S. v. *Winans,* 198 U. S. 371, 381.

The following treaties show cessions or reservations by the Indians and portions of the Great Lakes or of islands in those lakes:

First: The treaty of Greenville of August 3, 1795, and the language of the cession is as follows (2 Kappler's Indian Affairs, 2nd Ed., p. 40):

> "And for the same considerations and as an evidence of the returning friendship of the said Indian tribes of their confidence in the United States and desire to provide for their accommodation and for that convenient intercourse that will be beneficial to both parties the said Indian tribes do also cede to the United States the following pieces of land, to wit: * * *
>
> "13th. *The post of Michillimackinac and all the land on the island* on which that post stands

> and the main land adjacent of which the Indian title has been extinguished by gift or grant to the French or English Government; and a piece of land on the main to the North of the island to measure six miles on Lake Huron or the straits between Lake Huron and Lake Michigan and to extend three miles back from the water of the lake or strait *and also the island DeBois Blanc* being an extra and voluntary gift of the Chippewa Nation."

The former is now known as the Mackinac Island and *both are in Lake Huron.*

Second: In the Treaty of Fort Industry of July 4, 1805, with the Wyandot and other Indian Nations among them Pottawatomie Nation, the following establishes the boundary line between the United States and said Nation (2 Kappler 77, Art. II):

> Art. II. "The boundary line between the United States, and the nations aforesaid, shall in future be a meridian line drawn north and south, through a boundary to be erected on the south shore of lake Erie, one hundred and twenty miles due west of the west boundary line of the state of Pennsylvania *extending north until it intersects the boundary line of the United States,* and extending south it intersects a line heretofore established by the treaty of Greenville."

This cession is shown as No. 53 on the Map of Ohio in "Indian Land Cessions."

"Extending North until it intersects the boundary line of the United States" of course means North from the South shore of Lake Erie and hence running into the lake to such boundary line.

Third: In the Treaty of Detroit on November 17, 1807, with the Ottawa, Chippewa, Wyandot and

Pottawatomie Nations, the cession is as follows (2 Kappler 93, Art. 1):

> "Article 1. The sachems, chiefs, and warriors of the nations aforesaid, in consideration of money and goods, to be paid to the said nations, by the government, of the United States, as hereafter stipulated; do hereby agree to cede and forever quit claim, and do in behalf of their nations hereby cede, relinquish, and forever quit claim, unto the said United States, all right, title, and interest, which the said nations now have, or claim, or ever had, or claimed, in, or unto, the lands comprehended within the following described lines and boundaries; Beginning at the mouth of the Miami river of the lakes, and *running thence up the middle thereof* to the mouth of the great Au Glaize river, thence running due north, until it intersects a parallel of latitude, to be drawn from the outlet of Lake Huron, which forms the river Sinclair; thence running north east the course, that may be found, will lead in a direct line, *to White Rock, in Lake Huron, thence due east, until it intersects the boundary line between the United States and Upper Canada in said lake, thence southwardly, following the said boundary line, down said lake, through river Sinclair, lake St. Clair, and the river Detroit, into lake Erie,* to a point due east of the aforesaid Miami river, thence west to the place of beginning." (Cession No. 66 on Map "Michigan 1.")

Fourth: In the Treaty of Miami of Lake Erie with the Wyandot, Pottawatomie and other tribes on September 29, 1817, a cession of the Pottawatomies, Ottawas, and Chippewa tribes take in a portion of Lake Erie. (2 Kappler, 145.)

Fifth: In the Treaty of Saginaw, Michigan, September 24, 1819, with the Chippewas the Indian cession is as follows (2 Kappler 185):

"Art. 1. The Chippewa nation of Indians, in consideration of the stipulations herein made on the part of the United States, do hereby, forever, cede to the United States the land comprehended within the following lines and boundaries: Beginning at a point in the present Indian boundary line, which runs due north, from the mouth of the great Auglaize river, six miles south of the place where the base line, so-called, intersects the same; thence, west, sixty miles; thence, in a direct line, to the head of Thunder Bay River; thence, down the same, following the courses thereof, to the mouth; *thence, northeast, to the boundary line between the United States and the British Province of Upper Canada; thence, with the same, to the line established by the treaty of Detroit, in the year one thousand eight hundred and seven; thence, with the said line, to the place of beginning.*" (Cession 111, Map "Michigan 1.")

And the Indians make reservations as follows:

"Art. 2. From the cession aforesaid the following tracts of land shall be reserved, for the use of the Chippewa nation of Indians. * * * *One island in the Saginaw Bay.* * * *."

Sixth: In the Treaty of Washington of March 28, 1836, with the Ottawa and Chippewa Nations, the following was a cession to the United States (2 Kappler 450):

"Article First. The Ottawa and Chippewa nations of Indians cede to the United States all the tract of country within the following boundaries; Beginning at the mouth of Grand river of Lake Michigan on the north bank thereof, and following up the same to the line called for, in the first article of the treaty of Chicago on the 29th of August, 1821, thence, in a direct line, to the head of Thunder-bay river, thence with the line established by the treaty of Saga-

naw of the 24th of September, 1819, to the mouth of said river, *thence northeast to the boundary line in Lake Huron between the United States and the British province of Upper Canada, thence northwestwardly, following the said line, as established by the commissioners acting under the treaty of Ghent, through the straits, and river St. Mary's, to a point in Lake Superior north of the mouth of Gitchy Seebing, or Chocolate river, thence south, to the mouth of said river* and up its channel to the source thereof, thence, in a direct line, to the head of the Skonawba river of Green bay, thence down the south bank of said river to its mouth, thence, down the south bank of said river to its mouth, thence, in a direct line, *through the ship channel into Green bay,* to the outer part thereof, *thence south to a point in Lake Michigan west of the north cape, or entrance of Grand river, and thence east* to the place of beginning, at the cape aforesaid, comprehending all the *lands and islands,* within these limits, not hereinafter reserved. * * * (Cession 205, Map "Michigan 1.")

Article Third. There shall also be *reserved* for the use of the Chippewas living north of the straits of Michilimackinac, the following tract for the term of five years from the date of the ratification of this treaty, and no longer, unless the United States shall grant them permission to remain on said lands for a longer period, that is to say: Two tracts of three miles square each, on the north shores of the said straits, between Point-au-Barbe and Mille Coquin river, *including the fishing grounds in front of such reservations,* to be located by a council of the chiefs. *The Beaver islands of Lake Michigan for the use of the Beaver-island Indians. Round island, opposite Michilimackinac,* as a place of encampment for the Indians, to be under the charge of the Indian department. *The islands of the Chenos,* with a part

of the adjacent north coast of Lake Huron, corresponding in length, and one mile in depth. Sugar island, with its islets, in the river of St. Mary's. Six hundred and forty acres, at the mission of the Little Rapids. A tract commencing at the mouth of the Pississowining river, south of Point Iroquois, thence running up said stream to its forks, thence westward, in a direct line to the Red water lakes, thence across the portage to the Tacquimenon river, and down the same to its mouth, *including the small islands and fishing grounds*, in front of this reservation. Six hundred and forty acres, on Grand island, and two thousand acres, on the main land south of it."

Seventh: In the treaty of Detroit, January 14, 1837, with the Chippewas, among the cessions by the Indians are (2 Kappler 482):

One island in Saginaw Bay estimated at One Thousand acres being the island called "Shaingwaukokang" on which Mukokoosh formerly lived.

Eighth: In the Treaty of La Pointe of Lake Superior with the Chippewas, October 4, 1842, they made a cession to the United States as follows (2 Kappler 542):

"Article 1. The Chippewa Indians of the Mississippi and Lake Superior, cede to the United States all the country within the following boundaries; viz: Beginning at the mouth of Chocolate river of Lake Superior; *thence northwardly across said lake to intersect the boundary line between the United States and the Province of Canada; thence up said Lake Superior, to the mouth of the St. Louis, or Fond du Lac river* (*including all the islands in said lake*); thence up said river to the American Fur Company's trading post, at the southwardly bend thereof, about 22 miles from its

mouth; thence south to intersect the line of the treaty of 29th July, 1837, with the Chippewas of the Mississippi; thence along said line to its southeastwardly extremity, near the Plover portage on the Wisconsin river; thence northeastwardly, along the boundary line, between the Chippewas and Menomonees, to its eastern termination (established by the treaty held with the Chippewas, Menomonees, and Winnebagoes, at Butte des Morts, August 11th, 1827) on the Skonawby river of Green Bay; thence northwardly to the source of Chocolate river; thence down said river to its mouth, the place of beginning; *it being the intention of the parties of this treaty, to include in this cession, all the Chippewa lands* eastwardly of the aforesaid line running from the American Fur Company's trading post on the Fond du Lac river to the intersection of the line of the treaty made with the Chippewas of the Mississippi, July 29th, 1837." (Cession 261, Maps "Wisconsin 1" and "Michigan 1.")

Paraphrasing somewhat the language of Justice Baldwin in *Mitchel* v. *United States,* 9 Pet. 711, 749, we may say, as applying to this case:

> "By thus holding treaties with these Indians, accepting of cessions from them (of portions of the Great Lakes) with reservations, in establishing boundaries with them (the King) the United States waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property (in the Lakes) which they could cede or reserve, and that the boundaries of (his) their territorial and proprietary rights should be such and such only as were stipulated by these treaties."

IX.

NONE OF THE OTHER CESSIONS OF THE LANDS OF THE POTTAWATOMIES NOR, FOR THAT MATTER, OF ANY OF THE INDIAN NATIONS, SOUTH OF THE MILWAUKEE RIVER IN WISCONSIN AND OF THE GRAND RIVER IN MICHIGAN (SEE NO. VII, ANTE), INCLUDES ANY PART OF LAKE MICHIVAN OR ITS ISLANDS. WHEN A CESSION OR A CONVEYANCE OF UPLAND IS BOUNDED BY THE SHORE OF A STREAM OR LAKE THE OWNERSHIP OF THE BED OR SUBMERGED LANDS IS SEPARATED FROM THAT OF THE UPLANDS AND REMAINS IN THE PREVIOUS OWNERS.

The law is entirely well settled, even as between white men, that the ownership of any of the land along any of the Great Lakes does not carry with it ownership of the bed of the lakes. Even in the case of running streams the conveyance to the shore line does not carry with it the conveyance of the bed of the stream where the deed makes the water's edge the boundary line. See *People* v. *Board of Supervisors*, 125 Ill. 9.

> "Facts and circumstances may be examined, and if they affirmatively disclose an intention to limit the grant to actually traverse lines, these must be treated as definite boundaries."
>
> *Producers Oil Co.* v. *Hanzen*, 238 U. S. 325, 338.

A deed bounding the grant by the side of a stream excludes all common law right in the stream as a riparian proprietor.

> Farnham on Waters and Water Rights, Sec. 858.

In a conveyance calling for a lake as a line, the line at which the water usually stands when free from disturbing causes is the boundary of the land.

Chicago v. *Ward,* 169 Ill. 392, 406.

When land is conveyed bounded by a lake or pond the grant extends only to the water's edge.

Angel on Water Courses, Sec. 41.

No distinction is drawn in this country between public and private rights in great lakes.

Martin v. *Waddell,* 41 U. S. (16 Pet.) 410.

Pollard v. *Hagan,* 44 U. S. 229.

Gould on Waters, Sec. 32.

The title of riparian owners bounded by lakes extends to shore line only, for the body of water is called for as a boundary.

Fuller v. *Shedd,* 161 Ill. 462.

Seaman v. *Smith,* 24 Ill. 521.

Trustees of Schools v. *Schroll,* 120 Ill. 509.

The Illinois Supreme Court has refused to hold that a riparian owner is entitled to land left even by the recession of a small lake.

Hardin v. *Shedd,* 177 Ill. 123.

In *Child* v. *Starr,* 4 Hit. (N. Y.) 369, it was held that a boundary line running "eastwardly to the Genessee River, thence northwardly along the shore of said river," conveyed no part of the bed of the stream beyond low-water mark. The river was held to be excluded. This was followed by many other New York cases.

Gould on Waters, Sec. 200.

By the common law, parishes or towns upon tide waters, extend, like private estates, only to the highwater mark, unless proved by grant, prescription or usage to include the shore.

Ibid., Sec. 202.

The cases relating to lands under tide waters are equally applicable to navigable waters above the flow of the tide.

Hardin v. *Jordan*, 140 U. S. 371.

In the case of large bodies of irregular shape like the Great Lakes, the title to submerged lands is separate and distinct from the title to the shore lands.

Chicago v. *Ward*, 169 Ill. 392-406.
Fuller v. *Shedd*, 161 Ill. 462.
Seaman v. *Smith*, 24 Ill. 521.
People v. *Board of Supervisors*, 125 Ill. 9, 23.
Rockwell v. *Baldwin*, 53 Ill. 19.
Schulte v. *Warren*, 218 Ill. 108.
Revell v. *People*, 177 Ill. 468.
People v. *Kirk*, 162 Ill. 138.
Ill. Cent. Ry. Co. v. *Illinois*, 146 U. S. 387.
I. C. R. R. Co. v. *Chicago*, 173 Ill. 471 (affirmed in 176 U. S. 646).
I. C. R. R. Co. v. *Rucker*, 14 Ill. 353.

When the land along the shore is clearly and rigidly fixed by deed or by survey it will not be afterwards changed even by accretions.

Gould on Waters, Sec. 155.
Cook v. *McClure*, 58 N. Y. 437.
Rix v. *Johnson*, 5 N. H. 520.

Dana v. *Jackson St. Wharf Co.*, 31 Cal. 118.
Bates v. *Illinois Cent. R. R. Co.*, 1 Black (66 U. S.) 204.
Bristol v. *Carroll Co.*, 95 Ill. 84.
3 Kent's Commentaries, 434.
People v. *Board of Supervisors*, 125 Ill. 9.
Farnham on Waters and Water Rights, Sec. 837, 849, 857, 858, 861.
Handly v. *Anthony*, 5 Wheat. 374.

If such are the rules of ordinary conveyances between individuals or states, *a fortiori*, the rule of construction favoring the Indians would at least give the Indians the benefit of these rules. Furthermore, if the conveyances by the Indians of land to the shore only, or to the lake only, included islands and submerged lands in the lake, why should the Government have required in their treaties, as we have seen in number eight *ante*, the specific cession of the other parts of lakes and islands by metes and bounds running into those lakes, or else have procured express cessions of the various islands?

The cession of the shore lands by the Indians to the United States undoubtedly left the title to the bed and islands of this part of Lake Michigan, in the Indians.

X.

NOTHING PASSES IN AN INDIAN TREATY BY IMPLICATION; ON THE CONTRARY, THE MOST CLEAR AND UNAMBIGUOUS TERM MUST BE EMPLOYED. ALL THAT IS NOT EXPRESSLY CONVEYED IS RESERVED, AND IF AMBIGUITIES OCCUR THEY MUST BE RESOLVED FROM THE STANDPOINT OF THE INDIANS.

That the title to the islands and submerged lands in Lake Michigan were not included in the cessions by the Indians which ran to the lake shore only, is further aided by the foregoing rule that nothing passes in an Indian treaty by implication. What is not specifically conveyed, is reserved. Indeed, this is implied in the very words "Indian Reservation." It is but a restatement of the rule that all ambiguities in treaties with Indians are to be resolved in their favor. A number of expressions used by this court have already been noted under number IV *ante*. We will content ourselves by refering anew to the following cases:

Winters v. *United States*, 207 U. S. 564.
Jones v. *Meehan*, 175 U. S. 1, 10, 11, 12.
United States v. *Winans*, 198 U. S. 371, 380.
The Kansas Indians, 5 Wall. 737.
Choctaw Nation v. *United States*, 119 U. S. 1.
Choate v. *Trapp*, 224 U. S. 665, 675.
Woodward v. *De Graffenfried*, 238 U. S. 234.

XI.

IT IS NOT ALLOWABLE TO INTERPRET WHAT HAS NO NEED OF INTERPRETATION.

The foregoing is a familiar rule of construction not only between nations, but between individuals, and in construing constitutional provisions and legislative acts the Indians certainly, as a weaker people who are accorded all the benefits in construing doubtful language, are entitled to the benefit of the foregoing rule, where the import of the language is plain.

Under this rule we urge: First, that under the Treaty of Greenville (2 Kappler, 41) the Indians took everything south of the Canadian boundary line, hence including the bed of Lake Michigan, for the words "according to the boundary line agreed on by the United States and the king of Great Britain, in the treaty of peace made between them in the year 1783," have no need of interpretation. Second, that the nature of the title they took was one in fee simple, for the same Treaty provides (2 Kappler 42) that "when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until *such sale* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands," etc. Third: That it is also too plain for interpretation that when in the different cessions the shore of Lake Michigan was made the boundary line of those cessions, nothing was ceded beyond that boundary line; and hence the Indians did not part

with title to either the islands or submerged lands in the lake.

See Vattel's Maxims for Interpreting Treaties. Law of Nations, Book 2, Chap. 17.

XII.

WHERE A CONSTRUCTION IN A TREATY HAD BEEN ADOPTED BY THE PARTIES IT SHOULD BE FOLLOWED.

In *Patterson* v. *Jenks,* 2 Pet. 216, a question came up of the construction of some treaties between the State of Georgia and the Creek Indians. A real ambiguity was disclosed in those treaties. Chief Justice Marshall there said (page 230):

> "If the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, we should not hestitate to adopt that construction in this case."

This was between parties entirely *sui juris,* but both claiming from the State of Georgia. Among other questions was one whether the *locus in quo* was within or without the Indian hunting ground. In the case at bar such construction is directly invoked by the Indians themselves. Has not the United States in numerous treaties recognized the Indian ownership in the Great Lakes within the boundaries of the Northwest Territory? In the very Treaty of Greenville itself the Indian title to the lakes is recognized by the Government accepting an express cession of certain islands in the lakes. See No. 13 among the pieces of land enumerated in that Treaty. (2 Kappler 40.) Also the language of subsequent cessions from the Indians enumerated

under Number VIII *ante*. We invoke this construction by the Government as of a character so conclusive that it would seem that no argument against that construction should be tolerated. The benefit of this rule of construction may, as we have seen, be invoked by a person entirely *sui juris*. It is a rule of construction that obtains as to legislative acts and contracts. *A fortiori* the benefit of this practical construction by the Government cannot be denied to the Indians. Under that construction it therefore follows that the title to the bed, islands and shores of the Illinois part of Lake Michigan including the lands in question, was left in the Indians by the Greenville treaty.

XIII.

BY RECOGNIZING IN NUMEROUS TREATIES SUBSEQUENT TO THAT OF GREENVILLE, THE INDIAN TITLE TO THE LAKES, RIVERS AND ISLANDS IN THE NORTHWEST TERRITORY, BOTH THE GOVERNMENT AND THE INDIANS HAVE CONSTRUED THE GREENVILLE TREATY AS EMBRACING THE ISLANDS AND SUBMERGED LANDS OF LAKE MICHIGAN.

At the risk of wearying by repetition, we will say again that the language of the Greenville Treaty is too plain for construction; that in view of the language used when the United States "relinquished" to the Indians their claims to that part of the Northwest Territory not ceded to the United States, which the Treaty even called "Indian lands" and to which the Northern Boundary was given as "the boundary line agreed on by the United States

and the King of Great Britain in the Treaty of Peace made between them in the year 1783,"—we emphatically deny that there is anything left for construction; that the signing of the Greenville Treaty left the lakes (including the islands, submerged lands, shore lands, etc.), as well as the uplands, in Indian ownership, left them in that ownership in fee simple; and not only was it title in fee simple by a quit-claim from the Government but it was title by a warranty deed because of the guarantee by the Government (Greenville Treaty, Art. 5, 2 Kappler, 42) that "until such sale, the United States would protect all said Indian Tribes in the quiet enjoyment of their lands, etc."; but if there is anything to construe, later Treaties, which were entered into between the United States and the Indians, with the wording of the Greenville Treaty undoubtedly before the parties, and in contemplation of the minds of the representatives of both parties, show how both parties understood the Greenville cessions with reference to the lakes, their shores and islands.

In that long list of Treaties, throughout, the lakes that were included in the Northwest Territory and in the relinquishment at Greenville, the cessions by the Indians to the United States were by metes and bounds in the lakes and islands as well as in the uplands; every part of lake or island ceded was as particularly specified and described as were any portions of the mainland. (See VIII *ante*.) Is it even conceivable that this would have been done if the understanding by both parties to the Greenville Treaty had not been that the latter left complete

ownership to the lake, shores and islands in the Indians?

In *Shanks* v. *Dupont*, 3 Peters, 242, this court construed the Treaty of Peace of 1783 by the light of the subsequent Treaty with Great Britain in 1794.

In the Article on Treaties of Cession in 28 Am. & Eng. Ency. of Law, page 519 (2nd Ed.), it is said:

> "Tide lands and lands under navigable waters occupy no different position from that of other lands."

These later Treaties furthermore are practically conclusive evidence of how the officers of the Government, including the Treaty making Power, consisting of the President and Senate, had construed the Greenville Treaty in these respects. This court has looked upon that kind of construction as well nigh conclusive where there have been any ambiguities to construe.

Patterson v. *Jenks*, 2 Pet. 216, 230.

And we deny that in this case there is any ambiguity.

XIV.

CIRCUMSTANCES EXISTING AT THE TIME OF MAKING THE TREATY MAY BE CONSIDERED.

It is understandable, that the Government commissioners did not deem it worth while to purchase that part of Lake Michigan which has no islands of any importance. On the other hand, it cannot be assumed that by the Treaty of Greenville the Indians, although retaining all the lands border-

ing on the lakes, had given them up with their shores and islands and thereby renounced their occupation of fishing, which was one of their principal means of subsistence.

The circumstances surrounding the making of a Treaty may be considered as aids in its construction.

> *United States* v. *Winans,* 198 U. S. 371, 381.
> *U. S.* v. *Clarke,* 8 Peters, 436, 462.
> *Strother* v. *Lucas,* 12 Peters, 410, 438.

In the latter case Mr. Justice Baldwin said (page 438):

> "The terms of a treaty are to be applied to the state of things *then* existing in the ceded territory. (8 Peters, 462.)" (Italics ours).

To all these considerations must be added that the acknowledged title to the lakes, islands and shores had, under both the British and American Governments, been recognized as originally in the Indians. (See No. I, *ante.*) Can it be said that by any subtle or obscure construction of language in the Greenville Treaty that title was divested under the circumstances stated?

In *Winters* v. *U. S.,* 207 U. S. 564, 576, Mr. Justice McKenna said:

> "*The Indians had command of the lands and the waters*—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"

And the court then proceeded to construe the treaty in accordance with the contention most favorable to the Indians.

XV.

A CONSTRUCTION PLACED UPON A TREATY PROVISION BY GOVERNMENT OFFICERS WHOSE DUTY IT IS TO CONSTRUE AND APPLY THEM, IS ENTITLED TO GREAT WEIGHT.

We have heretofore referred to the practical construction placed by both parties upon the Treaty of Greenville with respect to the inclusion of lakes, shore lands and islands in their relinquishment by the Government to the Indians in the Greenville Treaty. (See VIII, *ante.*)

In *Patterson* v. *Jenks,* 2 Peters, 216, 229, Chief Justice Marshall said:

> "Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest made with Georgia and the Creeks, might claim a construction favorable to the pretension of the less powerful and less intelligent or skillful party to the compact. But in a controversy in which both parties claim title under the State of Georgia, *it would seem reasonable to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words.*"

And on page 230:

> "If the State of Georgia has construed this treaty by any subsequent acts manifesting her understanding of it, *we should not hesitate to adopt that construction in this case.*"

In *St. Paul, etc. Ry. Co.* v. *Phelps,* 137 U. S. 528, Mr. Justice Lamar said:

> "Had any such cases been presented when the language of the statutes under consideration was dubious and open to different interpretations, the established construction of them by the department charged with their execution would have very great force *and generally a controlling one* in the formation of the judgment of this court."

Even, therefore, assuming for the sake of the argument, (and only for the sake of the argument), that there is an ambiguity in the Greenville Treaty as to whether or not title to the lakes was left in the Indians, does not the construction put upon that treaty by the treaty making power of the nation in the eight treaties enumerated in No. VIII, *ante,* remove that ambiguity and make that construction *controlling?* And is not force added to that construction by the compilers on behalf of the Government of "Indian Land Cessions" heretofore referred to, under which the cessions in question are run to the shore line only of Lake Michigan; while the lines of cession under the eight treaties above referred to are on the maps shown as running into and across the lakes; and the part of Lake Michigan in question is not shown as included within any of the Indian cessions?

XVI.

BUT EVEN IF THE CONSTRUCTION OR THE POLICY OF DEPARTMENT OFFICERS HAD BEEN OTHERWISE, THE RIGHTS OF THE COMPLAINANTS WOULD NOT HAVE BEEN AFFECTED, FOR A SUPPOSED POLICY OR PRACTICE OF CONGRESS OR OF ANY OF THE GOVERNMENT DEPARTMENTS CANNOT CONTROL OR OVERCOME THE PLAIN PROVISIONS OF A STATUTE, AND HENCE OF A TREATY.

Among the arguments presented to the court below, and which seems to have influenced, more or less, the decision of the court, was that the United States is the trustee or guardian of the Indians; that the United States must have had knowledge or notice that more or less of the lands in question had been seized by some of the defendants and claimed by the state; that the United States has acquiesced in these claims by failing to take proceedings to oust the defendants or prevent further seizures; that, therefore, the United States must have thereby given a practical construction to the question of title in the Indians. It may be said for one thing that there never was an instance of Indians losing title by any such action on the part of the United States. It is doubtful whether a failure to act on the part of the United States at any time amounts to a construction of a title or of a treaty or statute, or of anything else. But when we speak of the United States, after all, we mean some officer or department that is charged with the particular duty. A supposed policy or practice of congress or of any of the government departments cannot control or over-

come plain provisions of a statute, and hence of a treaty.

St. Paul, etc. R. Co. v. *Phelps,* 137 U. S. 528.

Even the affirmative action by the Department of the Interior inserting restrictions in a lease by an Indian allottee which is contrary to a treaty is void and of no effect.

Jones v. *Meehan,* 175 U. S. 1, 32.

Even a direct conveyance made in violation of a treaty will not create an equitable estate in the grantee, although he may have paid all the purchase money and have taken actual possession of the land.

Clark v. *Akers,* 16 Kas. 166.
Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733.
Best v. *Doe,* 85 U. S. 112.
Heckman v. *United States,* 224 U. S. 413, 446.
Rice v. *Minn., etc. R. R. Co.,* 66 U. S. 147.
Mullen v. *Simmons,* 234 U. S. 192.
Franklin v. *Lynch,* 233 U. S. 269.

Except in cases purely political, Congress has no constitutional power to unsettle rights under a treaty or to effect titles already granted by the treaty itself.

Jones v. *Meehan,* 175 U. S. 1, 32.
Wilson v. *Wall,* 6 Wall. 83, 89.
Reichert v. *Felps,* 6 Wall. 160.
Smith v. *Stephens,* 10 Wall. 321, 327.
Holden v. *Joy,* 17 Wall. 211, 247.
Choate v. *Trapp,* 224 U. S. 665, 677, 678.

Bartlett v. *United States,* 203 Fed. Rep. 410.

Terrett v. *Taylor,* 13 U. S. (9 Cranch.) 43.

XVII.

THE FOREGOING RULE APPLIES TO WATER AS WELL AS TO LAND.

That the rule applies to water as well as to land may be seen by reference to *Winters* v. *United States,* 207 U. S. 564, the language of which has been quoted heretofore under XIV.

XVIII.

TITLE IN THE COMPLAINANTS BEING ESTABLISHED BY VIRTUE OF THE GREENVILLE TREATY, THE BURDEN OF SHOWING THAT THAT TITLE HAS BEEN AT ANY TIME DIVESTED IS ON THE DEFENDANTS.

Section 2126 (1 Kappler, 15) of U. S. Revised Stat. is as follows:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, *the burden of proof shall rest upon the white person,* whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

While the provision relates, apparently, merely to questions of fact, it is yet quite applicable to the matter under consideration.

Having traced the Indian title down to the Greenville Treaty of August 3, 1795, and having shown that the signing of that Treaty left the complete

title both of the Government and the Indians in the latter, we have established title in the complainants by previous possession or ownership under the terms of the Statutes. In our bill of complaint we pleaded the Greenville Treaty as a fact. Have we not thereby established a *prima facie* case and cast the burden of proof upon the defendants? And is it not true that in our bill of complaint we are merely required to make out a *prima facie* case? And if we are correct in this contention does it not follow that the District Court erred in sustaining the defendants' motion to dismiss the bill?

XIX.

EVEN UNDER ORDINARY RULES OF CONSTRUCTION A TREATY SHOULD BE CONSTRUED THE SAME AS A STATUTE, A CONTRACT, OR AN ORDINARY INSTRUMENT IN WRITING.

The defendants contend that the Greenville Treaty did not leave in the Indians a fee simple title; and, in fact, they contend that as to the islands, submerged lands and shore lands, the Indians were left no title at all and that to the extent that title was given them by that Treaty it was one of occupancy or of possession, and they are pleased to construe that occupancy as one of *pedis possessio;* and that whatever the Indians could not hold by physical occupancy, or which they no longer hold by physical occupancy, they have lost—that the title to that has disappeared—vanished. That is their contention, because it would appear to be impossible for them to

defend their title under any other contention. And yet, Art. 4 of the Greenville Treaty (2 Kappler, 41) plainly relinquishes the claims of the United States in the same language whereby the United States acquired any such claim, namely, the Treaty wtih Great Britain of 1783. The Greenville Treaty plainly says that the relinquishment is southward and westward of the Great Lakes, etc., "*according to the boundary lines agreed on by the United States and the King of Great Britain in the Treaty of Peace made between them in the year* 1783. Did the United States acquire from Great Britain merely a right of temporary occupancy—merely the right of *pedis possessio?*

The Greenville Treaty plainly says (Art. 5) that the United States will protect the Indians in the quiet enjoyment of their lands, etc. Whereon does the contention of the defendants rest that the Indian title merely followed the Indian footsteps, never reached Lake Michigan, its shores and islands, and disappeared when the Indians "left the neighborhood"? Whereon does such contention rest? It rests upon what was undoubtedly intended to allay the Indian fear rather than to entrap them, it rests upon the words in Art. 5 "the Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States." Do these words sound as though they were intended in some subtle way to destroy the absolute title otherwise relinquished to the Indians? The purpose of these words is declared to be "to prevent any misunderstanding." Must they

be construed as creating a misunderstanding which otherwise would not exist? And whose misunderstanding was it sought to remove, that of the United States or of the Indians? It is not conceivable that it was the former whose representative could easily rely upon the English by him otherwise used; the intention was obviously to prevent misunderstanding by the Indians. Was it not the purpose of these words to strengthen and not to weaken the grant to the Indians? They had already been given whatever claim the United States had acquired from Great Britain, and later told that their quiet enjoyment of the lands would be protected by the United States *until sale.* Would not an attempted limitation lead to, rather than prevent, a misunderstanding by the Indians? That such a trap had been set by General Anthony Wayne and by the United States Government to enmesh the Indians and betray their faith is hardly conceivable; the undoubted purposes of those words was to convey to the Indians the assurance that their use of the land was not restricted either as to manner or as to time.

As Chief Justice Marshall said in *Worcester* v. *Georgia,* 6 Peters, 515, 553:

> "So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.
>
> "To the United States, it could be a matter of no concern whether their whole territory was devoted to hunting-grounds, or whether an oc-

> casional village, and an occasional corn field, interrupted and gave some variety to the scene.
>
> "These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, etc."

A covenant for quiet enjoyment in a deed between private parties would not have the effect of destroying the fee simple character of a grant. Why should it be seriously entertained that such are the effects of the words in this Treaty? Even omitting all other reasons why those Treaties should be construed in favor of the Indians, they should still be entitled to the construction ordinarily placed upon deeds between private parties.

Quoting from Lord Denman in *Aspdin* v. *Austin*, 5 Q. B. 671, 684, Mr. Justice Brown said in *Tucker* v. *Alexandroff*, 183 U. S. 424, 436:

> "Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."

And further, quoting from 1 Kent's Com. 174:

> "Treaties of every kind * * * are to receive a fair and liberal interpretation according to the intention of the contracting parties and to be kept with good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."

In *Adams* v. *Akerlund*, 168 Ill. 632, 638, Justice Magruder said:

> "In thus giving a construction to the language of treaties, the courts will adopt the same general rules, which are applicable in the construction of statutes, contracts and written instruments generally, in order to effectuate the purpose and intention of the makers."

In the Amiable Isabella, 6 Wheaton, 1, 72, Justice Story said:

> "This court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice."

A supposed policy of the Government cannot control or overcome the plain provisions of a statute, hence of a treaty.

> *St. Paul, etc. Ry. Co.* v. *Phelps*, 137 U. S. 528.

If it had been intended by the Greenville Treaty to limit the otherwise plain expressions giving to the Indians what amounts to a warranty deed in fee simple, in the language of Chief Justice Marshall in *Worcester* v. *Georgia*, 6 Peters, 515, 554:

> "Had such a result been intended, it would have been openly avowed."

In *New York Indians* v. *U. S.*, 170 U. S. 1, 20, Mr. Justice Brown said, speaking of the *habendum clause:*

> "It may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted by the premises. * * *
>
> "In this case if the habendum clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and habendum clauses."

It is submitted that there is not even reasonable room for the contention that the Greenville Treaty limited the title of the Indians to the time and place of actual use and occupation, and that that title was forfeited wherever and whenever that use and occupation ceased. Whether, therefore, tested by the rule of construction of a treaty with Indians, resolving all ambiguities in their favor, whether it be by the rule that everything is reserved by the Indians which is not expressly ceded to the Government, or whether it be under the rule governing treaties and contracts generally, it must be concluded that the words in the Greenville Treaty "hunting, planting and dwelling thereon so long as they please" are merely explanatory of the use to which the lands could be put to by the Indians, or rather as an assurance that the Indians could put the lands to any kind of use they pleased and as long as they pleased, and were not in derogation of the fee simple title as explained to them by General Wayne (see No. II, *supra*); and they would not authorize a forfeiture the moment the Indians did not so use the land or at any spot where they failed to so use it. No such case of forfeiture has ever taken place in the history of the United States. The numerous treaties of cession in

the Northwest Territory, cited in No. VIII, *ante*, are all against any such theory of confiscation or forfeiture. It certainly cannot be held that these words were intended to destroy the effect of the guaranty by the United States that they would protect the Indians in the enjoyment of their lands until sale to the United States.

XX.

EVEN UNDER ORDINARY RULES OF CONSTRUCTION, WHERE LAND ALONG THE SHORE IS CLEARLY AND RIGIDLY FIXED BY DEED OR BY SURVEY, IT WILL NOT BE AFTERWARDS CHANGED EVEN BY ACCRETIONS.

The complainants' bill avers that in and about the year 1819 a survey was made by one John C. Sullivan, surveyor, which said survey purported to fix the so-called Indian boundary lines, the east boundary of which marked the eastern limit of the cession so made under and by virtue of the Greenville treaty of August 3, 1795, and in the cession of the Treaty of August 24, 1816, usually spoken of as the Treaty of St. Louis (Transcript 4). Copy of that survey, properly certified, is attached as an exhibit to the bill (Rec. 35; Transcript 18). A construction of the eastern boundary line of this very survey, or at least of the survey of 1821, which was a more particular survey of part of the same land, was given in *Bates* v. *Illinois Central Railroad Company*, 1 Black, 204, in which it was said:

> "The land had been surveyed in 1821, and on the plat of the government survey the north fraction of section 10 is represented as having the Chicago River on the south and *Lake Michigan on the east.*"

Exception was taken to part of the charge of the trial court, which was as follows (p. 207):

> "'Under this state of facts, the substantial truths of which are not denied, the land of Kinzie, covered by his entry and purchase, would be the tract *within the following boundaries,* as they existed at the time of the entry (there being no question made, but that the government plats, by which sales were made, show that the whole land north of the river and south of the north line of the fraction was sold as one parcel), and are the north line and west line of fractional section 10, according to the public survey, *and the Chicago River and Lake Michigan, as they existed; that is, it would include all the dry, firm land there was at that time between the west line of the section and the lake,* and the north line of the section and the river. *The river, the lake* and the two lines of the fractional section 10 constituted the boundaries. Whether the land in controversy was within these boundaries, is a fact to be found by the jury, depending upon the evidence before them.'"

This charge of the Circuit Court for the Northern District of Illinois was sustained and the judgment affirmed.

In Illinois the law as to running streams is that in the absence of provisions to the contrary the riparian owners take title to the middle or thread of the stream, but that in round bodies or bodies of irregular shape and large extent like the Great Lakes and even smaller lakes, the riparian owner takes only to the water's edge. But even in the face of this rule Illinois courts hold that the adjoining owner holds only to the water's edge even in running streams where that is fixed upon as the boundary in a deed or survey.

In *People* v. *Board of Supervisors*, 125 Ill. 9, this rule came to be applied to incorporated limits of the City of Edwardsville. Mr. Justice Scholfield there said, at pages 123 and 124:

> "The city is incorporated under a special charter, which, in defining its limits, uses this language: 'Beginning at the north-east corner of section No. 11, town 4, range 8, west of the third principal meridian, and running thence west on the section line, to Gordon's branch; thence down the meanderings of said branch, to the margin of Canokia creek; thence *down on the left bank of said creek*, to the line between sections Nos. 3 and 4, in said township,' etc. (Italics are the court's.) It is undoubtedly the established inference of the law, that a conveyance of land bounded on a highway or river, carries the fee to the center of the highway or river, provided the grantor, at the time, owned to the center, and there be no words or specific description to show a contrary intent; and we shall assume, for the present, at least, that this rule is equally as applicable to boundary lines of towns, etc., as to private grants. *But it is competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river, and to reserve the stream or flats below high-water mark, if he does it by clear and specific boundaries.* 3 Kent's Com. (8th Ed.), pp. 534, 535, *434. And so we said in *Rockwell* v. *Baldwin et al.*, 53 Ill. 22: 'It is, however, but a presumption, for *one man may own the bed of such a stream, and another may own the banks;* and where, in a deed conveying land, the boundary is limited to the bank of the stream, instead of bounding it on or along the stream, the presumption must fail. The party must be controlled by the terms of his deed.' There, the language, 'thence down the west line of the creek,' was held, in connection with certain circumstances tending to show the interest of the

> grantor to be to that effect, to establish the boundary line on the bank of the creek. * * * None of the cases cited in argument by counsel for respondents goes to the extent of holding that where a line is described as *running on a particular bank* of the stream, it in fact runs in the *middle* of the stream." (Italics are the court's.)

In *Trustees of Schools* v. *Schroll*, 120 Ill. 509, it was said (p. 518):

> "'It is equally well settled that grants of land bounded on streams or rivers above tide-water carry the exclusive right and title of the grantee to the center of the stream, *usque ad filum aquae*, subject to the easment of the navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. * * * *But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge.*'"

In *Cook* v. *McClure*, 58 N. Y. 437, it was held (from syllabus):

> "In an action of ejectment, plaintiff claimed under a deed conveying premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond.' Held, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the

gradual and imperceptible result of natural [illegible]"

See also Point IX, *ante*.

We recognize that there has been a difference of opinion among some of the courts with reference to smaller lakes, but none at all as to larger lakes. The only substantial conflict there seems to be among the authorities is as to whether high-water mark or low-water mark or ordinary water mark should be considered the boundary where such boundary is not more particularly specified, and also whether natural, imperceptible accretions belong to the riparian owner or the owner of the bed. All these questions are immaterial here for three reasons: firstly, because the then shore line of Lake Michigan was intended to be a rigid boundary, for the language of cession in the St. Louis Treaty, among others, is that the relinquishment is of the land "*contained within the following bounds*"; secondly, the bill of complaint in the case at bar charges that the defendants are holding land artificially made (Tran. 5, Rec. 14; Trans. 10, Rec. 22, etc.); thirdly, Lake Michigan having no appreciable tides, has, strictly speaking, no high or low water mark.

Both the Government and the Indians have repeatedly given practical construction to the Greenville Treaty as including the lakes in the relinquishments by the Indian Nations by the Government taking and paying for practically all the different portions of the Great Lakes, and of the islands in them, on the American side, excepting the part of Lake Michigan in question.

All the cessions by the Indians of Illinois lands were by metes and bounds and ran to the shore line of Lake Michigan only, hence bed of Lake Michigan was not included.

Treaty of St. Louis of Aug. 24, 1816, Art. I, 2 Kappler's Indian Affairs, 132.

Treaty of Prairie-du-Chien of July 29, 1829, Art. I, 2 Kappler's Indian Affairs, 297.

Treaty of Tippecanoe of Oct. 20, 1832, Art. I, 2 Kappler's Indian Affairs, 353.

Treaty of Chicago of Sept. 26-27, 1833, Art. I, 2 Kappler's Indian Affairs, 402.

In *Stone* v. *United States*, 2 Wall. 525, it was said:

"The grant to Delaware Indians in 1829 *calls for Camp Leavenworth as a boundary; consequently, the camp and its appurtenances were not included in the grant."*

XXI.

EVEN UNDER ORDINARY RULES RELATING TO PROPERTY IN THE BED OF LAKES AND RIVERS, RECLAIMED OR MADE LAND FOLLOWS THE TITLE TO THE BED.

See Point IX, *ante*.

XXII.

IN THE CASE OF LARGE BODIES OF IRREGULAR SHAPE LIKE THE GREAT LAKES, THE TITLE TO SUBMERGED LANDS IS SEPARATE AND DISTINCT FROM THE TITLE TO THE SHORE LANDS.

See Point IX, *ante*.

XXIII.

EVEN IN THE CASE OF RUNNING STREAMS OR MARSHES THE CONVEYANCE OF THE SHORE LINE DOES NOT CARRY WITH IT CONVEYANCE OF THE BED OF THE STREAM WHERE THE DEED MAKES THE WATER'S EDGE THE BOUNDARY LINE.

See Point IX, *ante*.

XXIV.

THE RIGHTS OF THE POTTAWATOMIES UNDER THE GREENVILLE TREATY WERE REITERATED AND REASSURED TO THEM BY THE TREATY OF ST. LOUIS OF 1816.

In the Treaty of St. Louis of August 24, 1816, in Article Three (2 Kappler, 133) appears the following:

> "The contracting parties, that peace and friendship may be permanent, promise that in all things whatever, they will act with justice and correctness towards each other, and that *they will, with perfect good faith, fulfill all the obligations imposed upon them by former treaties.*"

This is the Treaty by which the United States acquired from the Indians the tract of land along Lake Michigan which embraces the present site of Chicago. This language excludes any implication that the protection of "quiet enjoyment," etc., guaranteed to the Indians by the Greenville treaty, was no longer in force, and that any statute of limitations had commenced to run against their title to any of their property not ceded.

XXV.

THE SAME ASSURANCE WAS RENEWED TO THEM IN THE TREATY OF POTTAWATOMIE CREEK JUNE 5 AND 17, 1846.

Article Two of this Treaty (2 Kappler, 558) as follows, is the cession and reservation:

> "The said tribes of Indians hereby agree to sell and cede, and do hereby sell and cede, to the United States, all the lands to which they have claim of any kind whatsoever, and especially the tracts or parcels of lands ceded to them by the treaty of Chicago, and subsequent thereto, and now, in whole or in part, possessed by their people, lying and being north of the river Missouri, and embraced in the limits of the Territory of Iowa; and also all that tract of country lying and being on or near the Osage River, and west of the State of Missouri; *it being understood that these cessions are not to affect the title of said Indians to any grants or reservations made to them by former treaties.*"

No Statute of Limitations could have begun to run prior to that.

XXVI.

THE ASSURANCE WAS REPEATED IN SECTION 2079 OF THE REVISED STATUTES, ENACTED MARCH 3, 1871.

Section 2079 is as follows (1 Kappler, 8):

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen*

hundred and seventy-one, shall be hereby invalidated or impaired."

In addition, therefore, to restriction upon alienation, which of itself would prevent any statute of limitations from running, as elsewhere shown, have been these repeated assurances down to 1871 by treaties and statutes that the Greenville Treaty remained in force and that the Indians will be losing no rights granted by it, in violation of its provisions. So thoroughly did the Government take upon itself, even as late as 1871, the protection of the rights assured by the Greenville Treaty that the drastic Section 2013 was enacted to prevent any voluntary litigation by the Indians unless sanctioned by the Government. Section 2013 is in part as follows:

> "No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person, in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: * * *
>
> "It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it. * * *
>
> "All contracts or agreements made in viola-

tion of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

Can it be assumed that the United States intended to prohibit the Indians from engaging counsel of their own accord, to press their claims and then apply to them the rule of laches, or a statute of limitations or estoppel because they failed to do so? A failure to act can amount to laches, etc., only where there is a duty to act.

XXVII.

THE RESTRICTION UPON ALIENATION CONTAINED IN THE GREENVILLE TREATY RELIEVES THE INDIANS FROM THE NECESSITY OR OBLIGATION OF MAKING ANY ASSERTION OR CLAIM OF TITLE IN OR OUT OF COURT, AND THEIR TITLE IS NOT AFFECTED OR IMPAIRED BY ANY STATUTE OF LIMITAIONS, ADVERSE POSSESSION (IF ANY) OR THE RULE OF LACHES.

When the Government has vested all its title to land in fee simple in the Indians, the restriction against alienation is not intended for the benefit of the United States nor to enable it to repossess the lands, but is simply intended to protect the grantee

against his own improvident acts and against land falling into the hands of a foreign nation; also to declare that the title should remain in the grantee notwithstanding any alienation that he might make.

United States v. *Auger*, 153 Fed. 671.
Stephens v. *Smith*, 77 U. S. 321.
Schrimpscher v. *Stockton*, 183 U. S. 290, 299.
Pickering v. *Lomax*, 145 U. S. 310, 316.
United States v. *Noble*, 237 U. S. 74.
Henkel v. *United States*, 237 U. S. 43.

None of the defendants can acquire title by mere acts of seizure or possession no matter how long continued. Even a direct conveyance to them by the Indians would have given them no title and they cannot acquire title indirectly which they could not have acquired by direct conveyance.

A conveyance made in violation of a treaty will not even create an equitable estate in the grantee although he may have paid all the purchase money and have taken actual possession of the land.

Clark v. *Akers*, 16 Kas. 166.
Leavenworth, etc. R. Co. v. *United States*, 92 U. S. 733.
Best v. *Doe*, 85 U. S. 112.
Heckman v. *United States*, 224 U. S. 413, 446.
Rice v. *Minn., etc. Ry. Co.*, 66 U. S. 147.
Mullen v. *Simmons*, 234 U. S. 192.
Franklin v. *Lynch*, 233 U. S. 269.

The Indian title is guaranteed in the Treaty of Greenville by the United States. See *Worcester* v. *Georgia*, 6 Pet. 515, 557.

In *Schrimpscher* v. *Stockton*, 183 U. S. 290, 299, Mr. Justice Brown said:

> "Here the United States had issued a patent to Rodgers 'and to his heirs and assigns forever,' subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

In *Sheldon* v. *Donohoe*, 40 Kas. 346, it was said:

> "The land cannot be sold or otherwise disposed of except to the United States or to the members of the united bands of Indians, for whom it was reserved. So far as we are advised, the restriction on the alienation of this land has remained unchanged since its enactment in 1859, and it renders Sheldon incapable of taking title, and the deed from Donohoe to him absolutely void. * * * Sheldon was incapable of taking the title to the land then, and has been ever since that time. By the paramount federal law he was prohibited from taking the title, and therefore *he cannot indirectly build up one by adverse possession, estoppel, or any statute of limitations.* (*Stevens* v. *Smith*, 2 Kas. 243; *Stone* v. *Young*, 4 *id.* 17; *Pennoc* v. *Monroe*, 5 *id.* 578; *Clark* v. *Akers*, 16 *id.* 166; *Maynes* v. *Veale*, 20 *id.* 374; *McGannon* v. *Straightledge*, 32 *id.* 524.) * * * It has been expressly ruled, however, that a conveyance made in violation of a treaty will not even create an equitable estate in the grantee, al-

though he may have paid all the purchase money and have taken actual possession of the land. (*Clark* v. *Akers*, 16 Kas. 166.) The possession which Sheldon formerly held can count for nothing in this action. He not only could not purchase, but he was forbidden by law from going upon the land."

In *Auditor General* v. *Williams*, 94 Mich. 180, it was said:

"* * * and the question now presented is whether the United States by that instrument disposed of all its control and interest in the land to the patentee, or whether the condition against alienation is such a regulation as the state has a right to ignore or interfere with, when the scope and effect of the above mentioned compact is given consideration. If so, there can be no doubt of the right of the state to impose taxes upon it; but if, on the other hand, the restriction against alienation contained in the patent in pursuance of a resolution which the government had authority to make in the exercise of its watchful care for the Indian to whom the conveyance was made, then the land would not be amenable to taxation, for the reason that the state, by the legislation quoted, is bound never to interfere with the primary disposition of the soil within the same by the United States, nor with any regulation necessary for securing the title in such soil to the bona fide purchasers thereof. That the restriction against alienation contained in the patent is reasonable (Here the patent contained the non-alienaton clause in our case shown by the Treaty) and one which the government had a right to reserve when making a primary disposition of the land to the Indian of the class known as 'those not so competent,' we have no doubt; and it may well be inferred that this right was understood by the high contracting parties to the compact relating to the admission

of Michigan into the Union to have been inherent in the United States, and one which states subsequently established within the limits of the Northwest Territory would be bound in honor to maintain, for it is provided in article 3 of the ordinance of 1787 that 'the utmost good faith shall always be observed towards the Indians. Their land and property shall never be taken from them without their consent, and in their property rights and liberty they shall never be invaded or disturbed unless in just and lawful wars, authorized by congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done them.'

"In the case of *Goodell* v. *Jackson*, 20 Johns. 715, Chancellor Kent says that in the early days of the republic the government watched with great anxiety over the property of the Indians intrusted to its care, whether owned by tribes or families or individuals. If it was Indian property in land, it had a right to protection from us against our own people. And the Supreme Court of the United States in *U. S.* v. *Kagama*, 118 U. S. 375, asserted—as they have practically done in many other cases—that the Indians are wards of the nation and under the paternal superintendence of the government. It was in the faithful observance of this duty that the government made a distinction between the Indians, denominating some as 'competent' and others as 'those not so competent' and, in order to protect the latter class from their own folly, inexperience and weakness, as well as to guard them against the schemes of designing men, it placed a restriction against the alienation of the interest of the land conveyed by the patent. * * *

"It is not necessary to determine here the exact extent of the title conveyed by this patent, nor what the rights of those who may inherit it from the patentee may be at some time here-

after, nor whether or not this class of Indians are citizens of the state, with the right to exercise the elective franchise. All these are questions outside of what we deem to be material to an adjudication of the rights of the parties in this case. It is only necessary to say that under this patent from the United States the patentee has a right to the use, occupancy and enjoyment of the land, but has not the right to alienate it, either by direct or indirect means."

In *Choate* v. *Trapp*, 224 U. S. 665, 671, it was said:

"This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Chictaws and Chickasaws were divided in severalty among the members of the tribes. * * * But there is a broad distinction between tribal property and private property, *and between the power to abrogate a statute and the authority to destroy rights acquired under such law.* * * * The individual Indians had no title or enforceable right in the tribal property. But as one of these entitled to occupy the land, he did have an equitable interest which Congress recognized and which it desired to have satisfied and extinguished. * * * It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. * * *

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few *all recognize that he is not excepted from the protection guaranteed by the Constitution.* His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. * * * His private right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject

to the guardianship of the United States *as to his political and personal* status. * * * While Congress had power to make treaties it could not affect titles already granted by the treaty itself. * * * Incompetent persons, though citizens may not have the full right to control their property and there was nothing in citizenship incompatible with guardianship or with restricting sales by Indians deemed by Congress incapable of managing their estates. But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. *Such rights are protected from repeal by the provisions of the 5th Amendment.* * * * We have seen that it (exemption from taxation) was a vested property right which could not be abrogated by statute."

Of course, that property right could not be abrogated by any state statute of limitations either.

In *O'Brien* v. *Bugbee*, 46 Kas. 13, the court said:

"Neither can O'Brien nor Updegraff claim any title under the statute of limitations on account of the possession of their grantors, or the parties through whom they claim, because the title or possession of Polly Manture was so restricted and limited that adverse possession could not give title without the consent of the secretary of the interior. * * *"

"Again, the deed from George Buchanan to Joachim Rathjen, who quit-claimed to John C. McCoy, Sr., on the 12th of August, 1881, counts for nothing. It was never approved by the secretary of the interior, and was void; therefore, neither McCoy nor his grantees are estopped by any recitations therein contained. (7 Am. & Eng. Ency. of Law, p. 5, note 2, * * * 3 Washb. Real Prop., p. 106.)"

What is said on this point has relation so far as any statute of limitations, adverse possession (if any) or the doctrine of laches may be invoked against the Indian title as such. It is further our contention that neither could they be invoked upon the bill of complaint here as against the complainants, even if the latter were white men and were compelled to assert their title under ordinary state laws. This contention we will treat separately. (See No. XXXV *post.*)

XXVIII.

UNTIL THE EXTINGUISHMENT OF THE INDIAN TITLE THE LAND IN QUESTION WAS NOT EVEN TAXABLE, NOR WOULD IT BE FOR FIVE YEARS THEREAFTER UNDER THE PROVISIONS OF THE ORDINANCE OF 1787, AND UNDER THE ENABLING ACT FOR ADMITTING ILLINOIS AS A STATE.

Under No. XXVII *ante* we quoted a number of authorities in which it was recognized that the State has no right to tax lands to which the title remains unextinguished. This immunity from taxation has been even extended to individual Indian allotments in which the right of alienation has been by the Government prohibited for periods of from five to twenty-five years.

In the present case, however, this right is further protected by the provisions of the famous Ordinance of 1787. As we are showing elsewhere, the general government has the exclusive right to extinguish the Indian title. The lands in question could not become even part of the public domain until after such extinguishment.

Article Four of the Ordinance of 1787 provides:

> "The legislature of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States."

This was among "the articles of compact between the original states and the people and states in the said territory," to "forever remain unalterable, unless by common consent," as provided by Sec. 14.

Article Three provides:

> "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent."

Taxing the Indian lands, as we have shown in No. XXVII *ante*, would be one way, and a very effective way, of taking lands and property from the Indians without their consent. This is prohibited by the Ordinance of 1787 as well as by the decisions cited under the preceding number. Many state as well as Federal decisions have fully recognized this want of power in the State to tax Indian lands. Among them may be mentioned:

Wah-Pe-Man-Qua v. *Aldrich*, 28 Fed. 489.
Auditor General v. *Williams*, 94 Mich. 18.
Choate v. *Trapp*, 224 U. S. 665.
New Jersey v. *Wilson*, 7 Cranch. 164.
The Kansas Indians, 5 Wall. 737, 761.
United States v. *Rickert*, 188 U. S. 432.

It is, therefore, not conceivable that any claim can be advanced (if the court could assume such a thing upon a demurrer to the bill), that the Indians have lost title through any statute of limitations operating against them because of any taxing laws. Obviously, if such loss of title by the Indians might be permitted, such loss should be affirmatively pleaded instead of being raised by demurrer, or, as in this case, upon motion to dismiss. The considerations, therefore, advanced under this head exclude any possibility of any statute of limitations operating through non-payment of taxes.

The Enabling Act of April 18, 1818, for the admission of Illinois as a State, provides that "the said State shall provide by an Ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of January, 1819, shall remain exempt from any tax laid by order or under any authority of the State, whether for State, county or township, or any other purpose whatever, for the term of five years from and after the day of sale." This provision was accepted by Illinois by Ordinance passed by its Constitutional Convention on August 26, 1818.

1 Jones & Addington, Ill. Stat. Ann. 63.

It is significant that the Ordinance of 1787 (Sec. 8) prohibits the laying out of, even into counties and townships, any part of the land in which the Indian title has not been extinguished.

From *Blue Jacket* v. *Com'rs. of Johnson Co.*, 5 Wall. 737:

"The Ohio Shawnees, when they ceded their lands in Ohio, did it in pursuance of an Act of Congress of May 28, 1830, ch. 148 (4 Stat., 411), which assured them the country to which they were translated should be secured and guaranteed to them and their heirs forever.

* * * * * *

"* * * *It is conceded that those who hold in common cannot be taxed.*

* * * * * *

"If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties and laws of Congress."

From *Fellows* v. *Denniston*, 5 Wall. 761:

"The question of taxation of Indian lands, while in their tribal organization, by the state authorities, has been before us this term in several cases from the State of Kansas, and after a very full consideration of the subject the power was denied. *Blue Jacket, et al.* v. *Com. of Johnson Co.; Yellow Beaver, et al.* v. *Com. of Miami Co.; Wan-zop-e-ah* v. *The Same* (*ante*, 667.) We refer to the opinions in these as rendering any further examination of the subject unnecessary.

* * * * * *

"We have already given the answer which we think satisfactory to this ground in support of the judgment below. Until the Indians have sold their lands, *and* removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their original rights, and entitled to the undisturbed enjoyment of them."

This exemption from taxation under state laws was enforced even after the Indians had become citizens. In *Choate* v. *Trapp*, 224 U. S. 665, it was said:

"2. The individual Indian had no title or enforceable right in the tribal property. But as one of those entitled to occupy the land, he did have an equitable interest, which Congress recognized, and which it desired to have satis fied and extinguished. * * *

"* * * Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land. After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued."

XXIX.

THE ORDINANCE OF 1787 IS PART OF THE FUNDAMENTAL LAW OF ILLINOIS, OF SUBSTANTIALLY THE SAME AUTHORITY OF THE CONSTITUTION OF THE UNITED STATES, AND IS PART OF THE SUPREME LAW OF THE LAND.

Illinois was admitted as a State under the Enabling Act of April 18, 1818, which provided for a constitution to be adopted by the State. This provision is:

"Provided that the same, whenever formed, shall be republican and not repugnant to the Ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the River Ohio."

This ordinance of 1787 has been regarded as substantially of the same authority as the Constitution

of the United States and part of the supreme law of the land.

XXX.

THE PROVISIONS OF THE GREENVILLE TREATY ARE ALSO PART OF THE SUPREME LAW OF THE LAND.

Article VI of the Federal Constitution provides (Second):

> "This Constitution and the laws of the United States shall be made in pursuance thereof; *and all treaties made* or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If a treaty embraces matter contravening the statutes of the State, the State statute should be disregarded and full protection of the treaty should be extended. This applies to treaties with Indians as well as with foreign nations.

Leavenworth, etc. Ry. Co. v. *United States*, 92 U. S. 733.

United States v. 43 *Gallons of Whisky*, 93 U. S. (3 Otto) 188.

Fellows v. *Blacksmith*, 19 How. 366.

Orr v. *Hodgson*, 4 Wheat. 453.

Choate v. *Trapp*, 224 U. S. 665.

It follows, therefore, that the several acts of the Illinois Legislature authorizing the City, the several Park Commissions and others to reclaim or build upon any part of the submerged lands of Lake Michigan are against the guaranties of the Greenville Treaty and are void.

In *Fellows* v. *Blacksmith*, 19 How. 366, 372, the court said:

> "An objection was taken, on the argument, to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is, that the treaty, after executed and ratified by the proper authorities of the Government, become the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress. (1 Cranch, 103; 6 Pet. 735; 10 How. 443; 2 Pet. 307, 309, 314; 3 Story Const. Law, p. 695.)"

XXXI.

AN INDIAN TREATY IS AT LEAST A CONTRACT, AND PROPERTY RIGHTS THEREBY ACQUIRED ARE ENTITLED TO THE SAME CONSTITUTIONAL PROTECTION AS ANY OTHER PROPERTY RIGHTS. ANY STATE STATUTE WHICH IS IN VIOLATION OF THE CONSTITUTIONAL PROVISION OR OF TREATY RIGHTS IS VOID.

If a treaty embraces matter contravening the statutes of the state, the state statute should be disregarded and full protection of the treaty should be extended. This applies to treaties with Indians as well as with foreign nations.

Leavenworth, etc. Ry. Co. v. *United States*, 92 U. S. 733.

United States v. 43 *Gallons of Whisky*, 93 U. S. (3 Otto) 188.

Fellows v. *Blacksmith*, 19 How. 366.

Orr v. *Hodgson*, 4 Wheat. 453.

Choate v. *Trapp*, 244 U. S. 665.

Thus in *Choate* v. *Trapp*, 224 U. S. 665, it was said:

> "7. There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *Re Heff*, 197 U. S. 504, 49 L. Ed. 855, 25 Sup. Ct. Rep. 506; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 307, 47 L. Ed. 190, 23 Sup. Ct. Rep. 115; *Jackson ex dem. Smith* v. *Gooddell*, 20 Johns. 188; *Lowry* v. *Weaver* v. *McLean*, 82 Fed. Cas. No. 8,584; *Whirlwind* v. *Vonder Ahe*, 67 Mo. App. 628; *Taylor* v. *Drew*, 21 Ark. 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status. * * * While Congress has power to make treaties, it could not affect titles already granted by the treaty itself.
>
> "Nothing that was said in *Tiger* v. *Western Investment Co.*, 221 U. S. 286; 55 L. Ed. 738; 31 Sup. Ct. Rep. 578, is opposed to the same conclusion here. * * *
>
> "There was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. *Such rights are protected from repeal by the provisions of the 5th amendment.*"

While since the case of *Worcester* v. *Georgia*, 6 Pet. 515, the constitutional protection of the rights of Indians has been ordinarily invoked in the cases of individual allotments, yet there can be no difference in the case of tribal ownership. The allotment is considered to be merely the result of a partition

of the original title in common. Thus it was said by Mr. Justice McReynolds in *McDougal* v. *McKay*, 237 U. S. 372, 383, quoting from *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 529:

> "'So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act.'"

From *People of the State of New York* v. *Dibble*, 21 How. 366, 371:

> "The Supreme Court and the Court of Appeals of New York have decided, 'that the provisions of this Act respecting intrusions on Indian lands, which authorize the summary removal of persons, other than Indians, who settle or reside upon lands belonging to *or* occupied by any nation or tribe of Indians, are upon their land before their title has been extinguished, *and* they have removed, or have been removed by the act of the government, can acquire no such right of property or possession as is within the protection of the provisions of the Constitution which secure a trial by jury.' They, therefore, affirmed the judgment of the County Judge.
>
> * * * * * *
>
> "The judgment of the Court of Appeals of New York is, therefore, affirmed with costs."

From the *State of New Jersey* v. *Wilson*, 7 Cranch, 164:

> "A legislative act, declaring that certain lands which should be purchased for the Indians, should not thereafter be subject to any tax, *constituted a contract, which could not be rescinded by a subsequent legislative act;* such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.
>
> * * * * * *
>
> "* * * The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. *This contract is certainly impaired by a law which would annul this essential part of it.*"

From *Choate* v. *Trapp*, 224 U. S. 665, 678:

> "But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. *Such rights are protected from repeal by the provisions of the 5th amendment.*"

XXXII.

ANY STATUTE OR ORDINANCE DEPRIVING OR TENDING TO DEPRIVE INDIANS OF THEIR PROPERTY IS ALSO VOID UNDER ARTICLE THREE OF THE ORDINANCE OF 1787.

We have heretofore had occasion to call attention to this Article. For convenience it is repeated here:

> "ARTICLE III. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The

utmost good faith shall always be observed towards the Indians; *their lands and property shall never be taken from them without their consent;* and in their property, rights and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

XXXIII.

EVEN GOVERNMENT PATENTS ARE VOID IN VIOLATION OF INDIAN TREATY RIGHTS.

The principle is quite familiar that neither a government nor state patent to land conveys title to a patentee where the title to the land was not in the government or in the state, as the case may be, at the time it was issued.

Stone v. *United States,* 2 Wall. 525.
Best v. *Doe,* 85 U. S. 112.
Rice v. *Minn., etc. Ry. Co.,* 66 U. S. 147.

This rule has been applied in several striking cases involving enormous values and numerous patents. In *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733, so much of the land claimed by the Railroad was declared to be Indian property as to endanger the security of the mortgage holders. The court there said:

> "It is urged that parties have loaned money on the faith that the lands in question were covered by the grant. This is a subject of regret, as is always the case when a title, on the strength of which money has been advanced, fails; but it is to be hoped that the security

> taken upon the other property of the Company will prove to be sufficient to satisfy the claims of the holders of its bonds. But whether this be so or not, it is hardly necessary to say that the title to land is not strengthened by giving a mortgage upon it; nor can the fact that a mortgage has been given throw any light upon the title of the mortgagor."

In *Heckman* v. *United States,* 224 U. S. 413, 415, some 30,000 conveyances, a large proportion of them in the shape of government patents, were cancelled as being in violation of treaty rights of the Indians and in violation of restrictions upon alienation. Many of the parties who were thus ousted must have acquired the property in good faith, and the values of the lands taken out of their hands by the proceedings must have run up into many millions.

In *Northern Pacific Railway Company* v. *United States,* 227 U. S. 355, a bill in equity was filed against the Northern Pacific Railway Company to annul patents to large tracts of land. The patents, dated in 1864, were alleged to have been issued by mistake, as there had been what the court found to be an erroneous survey. The difference between the former survey and the corrected one amounted to 293,837 acres (page 358), and it was a matter of public notoriety that the values involved ran into many millions of dollars. The original survey which was held to be erroneous was made about the year 1860. Notwithstanding the lapse of time, many, if not all, the holders of patents claimed to have acquired them in good faith and for value, and notwithstanding also the enormous money losses thereby occasioned, the court's action in vacating

the patents and restoring the land to the Indians was sustained. The pleas of the statutes of limitations were overruled. The court rested its decision upon the Indians' primary rights of title and also treaty rights and upon the special protection from the government to which the Indians are entitled.

The foregoing cases therefore furnish additional reasons for declaring that the several state statutes involved in this case are invalid as in contravention of the complainants' rights.

XXXIV.

THE POWER TO ENFORCE TREATY PROVISIONS IS PARAMOUNT AND SUPREME, AND RESTS IN THE FEDERAL COURTS UPON EVERY FOOT OF SOIL WITHIN THE BOUNDARIES OF THE UNITED STATES.

One of the contentions advanced by the defendants below was that the bill does not present a case for Federal jurisdiction. Among other grounds however of Federal jurisdiction in this case is that it is invoked to enforce the provisions of the Greenville Treaty.

In *United States* v. *Flournoy Live Stock & Real Estate Co.*, 69 Fed. Rep. 886, Judge Shiras said, at page 893:

> "It cannot be questioned that the power of the United States government over the Indian tribes is paramount and supreme. *U. S.* v. *Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109. If the United States, by a treaty duly made with an Indian tribe, has assumed a given duty or obligation to the Indians, the power exists to properly perform this duty within the boun-

daries of the states, as well as within the territories. The power to enforce its laws, and the treaties made by it, in pursuance of the provisions of the constitution, is paramount and supreme, and rests upon every foot of soil within the national boundaries. *Ex parte Siebold,* 100 U. S. 371; *In re Neagle,* 135 U. S. 1, 10 Sup. Ct. 658; *In re Debs,* 158 U. S. 564, 15 Sup. Ct. 900."

XXXV.

EVEN IT THIS WERE NOT AN INDIAN TITLE, NO MERE CLAIM OF TITLE, NOT ACCOMPANIED BY ACTUAL PHYSICAL, ADVERSE POSSESSION, HELD FOR THE FULL PERIOD OF THE STATUTE OF LIMITATIONS, COULD RIPEN INTO A TITLE. SUCH A TITLE MANIFESTLY CANNOT BE SET UP AS AGAINST SUBMERGED LAND OR RECENTLY RECLAIMED LAND, NOR AGAINST VACANT OU UNOCCUPIED, NOR AGAINST UNTAXED OR UNTAXABLE LAND.

Among the grounds of the defendants for their motion to dismiss the bill, is that "the complainants have lost whatever title or right they may have had in said land, if any, by their long and unexcused delay in protecting their alleged title and right" (Abst. 32; Rec. 35). The bill of complaint alleges, and for the purpose of the motion to dismiss, must be taken as true, that "said seizures have been and are in violation of the said treaties; but very few improvements of great value have been made thereon and most of them within recent years; nearly all such improvements of any substantial value have been made since these complainants have openly, notoriously and publicly asserted their claims or right of property and with full and explicit knowledge or

notice of such rights in these complainants; and that these complainants have done or suffered nothing as to any part of such lands which justly or properly gives the right to any claim to any of these defendants of title to these lands or any part thereof under any statute of limitations, laches or estoppel and these complainants at no time expressly or implicitly abandoned said lands or any part thereof." It is evident that under this allegation of the bill, once the Indian title is recognized, if any of the defendants have as to any part of the property by them occupied a defense against complainants, either under any statute of limitations, laches or estoppel, it becomes an affirmative defense to be pleaded and made the subject of a hearing and decision on the facts by the trial court. A wholesale claim of statute of limitations, laches or estoppel as to lands occupied or unoccupied, improved or unimproved, upland or submerged, whether recently occupied or occupied for any extended period, obviously cannot be allowed. If we assume that any such defenses would lie against an Indian title the occupation of a small piece of upland would not justify a later seizure of land submerged and but recently reclaimed. Many considerations bar any such defense taken by way of a motion to dismiss or demurrer.

The doctrine of constructive possession under color of title cannot be extended to large tracts of land not taken for the ordinary purposes of cultivation and occupation.

Wood on Limitations, 3rd Ed., Sec. 262.

The actual possession or *pedis possessio* is essential upon which to base a title by adverse possession or the statute of limitations (2 C. J. 51).

The constructive possession of land is always in the holder of the best title (2 C. J. 53).

An instructive review of what constitutes adverse possession may be found in *Ward* v. *Cochran,* 150 U. S. 597, where Mr. Justice Shiras said, at page 608:

> "Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title."

A mere claim to land, unaccompanied by actual possession, will not ripen into a title, however long and persistently such claim is asserted, and this principle is not affected by the fact that the claimant has paid taxes on the land. And a statute giving a right of action against a mere claimant of title, unaccompanied by possession, does not change the rule requiring the possession to be actual. (2 C. J. 53.)

> "A residence in the vicinity of the land merely, and a claim to it, although such claim is generally recognized and spoken of in the neighborhood and affirmed by the vicinage, unaccompanied by any of the acts and indicia of ownership, are insufficient to constitute possession." *Wood* v. *McGuire,* 15 Ga. 202.

In *Smith* v. *Lee,* 1 Coldw. (Tenn.), 549, 552, the court said:

> "The inference that, because by the recent statute a mere claim of title, unaccompanied by adverse possession, gives a right of action against such claimant, the Statute of Limitations, therefore attached in his favor, by the mere force of such adverse claim, is utterly destitute of foundation in law."

The depositing of material or refuse on another's land does not ordinarily constitute such actual possession thereof as may ripen into title by adverse possession. (2 C. J. 70.)

> "The doctrine seems to be that when an usurper enters upon land, he acquires possession, inch by inch, of the part which he occupies, and that the mere naked possession, without color of title, is adverse only to the extent of the actual enclosure, which must be definite and notorious. Tyler on Ejectment, 894."
>
> *Bristol* v. *Carroll County,* 95 Ill. 84, 93.

If the bed of a body of water is in private ownership, even the accretions formed upon it belong to the owner of the bed and not to the owner of the uplands. Made land follows the title to the bed. Adverse possession of the shore lands can never give right or title to the submerged lands.

> Farnham on Water and Water Rights, Sec. 837.

Laches cannot be imputed to one who is ignorant of his rights and for that reason only failed to assert them.

> *Middaugh* v. *Fox,* 135 Ill. 344.
>
> *Lasker* v. *McCreary,* 66 Fed. 841.

Ritchie v. *Sayers*, 150 Fed. 520.
Halstead v. *Grinnan*, 152 U. S. 412.
Moore v. *Crawford*, 130 U. S. 122.
Lurton v. *Rodgers*, 139 Ill. 554.
Sutherland v. *Reeve*, 151 Ill. 384.
Berry v. *Lovi*, 107 Ill. 612.

The doctrine of laches will not apply where the party asserting it has gained more than he lost by failure or silence of the other party.

Hinds v. *Surbeck*, 260 Ill. 606.
Peabody v. *Burri*, 255 Ill. 592, 603,

or unless circumstances amount to an estoppel.

Galway v. *Met. Elev. R. Co.*, 13 L. R. A. 788, 128 N. Y. 132, aff'g 35 N. Y. S. R. 628.

XXXVI.

ALL STATUTES OF LIMITATIONS ARE BASED UPON THE THEORY OF LACHES AND THE THEORY OF LACHES IN ITS TURN CAN BE INVOKED ONLY UPON A STATE OF FACTS WHERE SOME DETRIMENT OR PREJUDICE HAD REEN SUFFERED; AND WHERE THE COMPLAINANTS HAVE NOT EXPENDED IN IMPROVEMENTS AND TAXES IN THE EXCESS OF THE RENTS OR BENEFITS RECEIVED ON THE LANDS, NEITHER LACHES NOR THE STATUTE OF LIMITATIONS CAN BE INVOKED.

The defense of the State of limitations or laches or adverse possession is sought to be raised in this case upon a mere motion to dismiss, equivalent to a demurrer. We pointed out in the preceding point in our argument that even where such a defense can otherwise be made, it can only apply to a case of adverse *pedis possessio*, actual and not constructive,

open, notorious, etc., where such possession had continued for the requisite length of time. In order to sustain such a defense in this case the court is asked to take judicial notice that all of the land claimed has been so adversely held; which would in itself amount to a violent assumption, and is against the allegations of fact contained in the bill. The court should in equity take judicial notice of the contrary, viz.: to the extent that the lands are still submerged they are not being adversely held. If such lands alone were involved in this suit, a motion to dismiss cannot properly be sustained, for the bill is brought not merely to quiet title, but to restrain and enjoin further seizures (Abst. 10; Rec. 23).

Some of the defendants must have felt that it would be an act of hardihood to make this defense on a motion to dismiss, for not all of them set it up in support of that motion. The Illinois Central Railroad Company does, however, set up this defense (Transcript 37; Rec. 75). It says:

> "Twelfth. * * * It further appears from the said bill that the United States, State of Illinois and the City of Chicago and this defendant have for more than sixty years been exercising acts of possession," etc.

The bill sets up no acts of possession by the United States nor by the State of Illinois; and as to the City of Chicago and the Illinois Central Railroad, there is no averment that will apply to all the lands claimed nor to any given length of time. We will assume, however, that it is a fact that the Illinois Central Railroad has exercised some acts of

ownership as to some of the property since 1852. As to that portion of the property, therefore, if we are to assume that the complainants as Indians are bound by the ordinary rules of laches estoppel and statute of limitations which apply to others, it still remains a question of fact whether the facts and circumstances justify such a defense. At best, the Illinois Central Railroad's claim amounts to a mere right of way and is not a fee.

We have seen that mere laches will not debar a party who is ignorant of the facts or ignorant of his rights (see No. XXXV *ante*), both as to laches and the statute of limitations. We, of course, insist that they do not apply in any event to an inalienable title nor against Indians. But the defense of laches is based upon the theory of estoppel. If the court is disposed to take judicial notice of the facts of occupancy by the Illinois Central Railroad, it should also in fairness take judicial notice of the fact that the Illinois Central Railroad has profited by its possession vastly more than it has lost by it.

> "All statutes of limitations are based on the theory of laches. (*Mettler* v. *Miller*, 129 Ill. 630; *Peabody* v. *Burri*, 255 *id.* 592.) Neither plaintiffs in error nor their ancestor have expended money in improvements and taxes in excess of the rents received on the land here in question. Nothing is shown to indicate that any prejudice has resulted to plaintiffs in error by reason of the non-action of defendant in error."
>
> *Peabody* v. *Burri*, 255 Ill. 592.

See also:

Hinds v. *Surbec*, 260 Ill. 606.

This case was decided in 1912, on a claim of title which first arose in 1854, and from which time continuously the land which was the subject-matter of the litigation was in the actual control or possession of another. The court held that a mere failure during all this time on the part of the complainant to assert title did not debar him where the circumstances were such as to prevent the statute of limitations from running.

XXXVII.

BOTH LACHES AND THE STATUTE OF LIMITATIONS ARE AFFIRMATIVE DEFENSES AND TO BE AVAILED OF MUST ORDINARILY BE PLEADED.

"Where there is no positive limitation of time, the question whether the Court will interfere or not depends upon whether, from the facts of the case, the Court will infer acquiescence, or confirmation, or a release. Such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer; because a defendant has no right to avail himself, by demurrer, of an inference of fact upon matters on which a jury, in a Court of Law, or the Court in Equity, would collect matter of fact to decide their verdict."

1 Daniell's Ch. Pl. & Pr., 561.

Gormley v. *Bunyan*, 138 U. S. 623.

XXXVIII.

EVEN AS AGAINST PERSONS OTHER THAN INDIANS THE CONSTRUCTIVE POSSESSION OF LAND IS ALWAYS IN THE HOLDER OF THE BEST TITLE.

In No. XXXV and XXXVI *ante* we took occasion to point out that the defense of laches and the statute of limitations, if they can be entertained at all on the state of this record, and if available against the Indian complainants, would apply only as to lands actually and not constructively held. As that defense in the present case can only be sustained upon the theory that the court will take judicial notice of acts of possession, it will naturally take notice that a large part of the reclaimed and formerly submerged lands, as well as the former islands, are wholly unimproved, or here and there but slightly improved for park purposes, etc. It would probably not be too much to say that as a matter of fact fully 95 per cent, if not 99 per cent, of even the reclaimed land is of that character. The defendants are, therefore, relying, if at all, upon constructive possession only as to such improved land. By no possible act of reasoning can the defense of laches or the statute of limitations apply in the case of such constructive possession merely, for constructive possession is in the holder of the best title; and the best title in this case is the record title established by the Treaty of Greenville, antedating all other records upon which any of the defendants may rely.

2 Corpus Juris, 53.

Ward v. *Cochran*, 150 U. S. 597, 608.

Bristol v. *Carroll County*, 95 Ill. 84, 93.

XXXIX.

THE DOCTRINE OF CONSTRUCTIVE POSSESSION UNDER COLOR OF TITLE CANNOT BE EXTENDED TO LARGE TRACTS OF LAND NOT TAKEN FOR THE ORDINARY PURPOSES OF CULTIVATION AND OCCUPATION.

Wood on Limitations, 3rd Ed., Sec. 262.

XL.

THE DEPOSITING OF MATERIAL, ETC., IS NOT SUCH POSSESSION.

The acts of possession relied upon mainly as creating a condition from which the court is asked to infer laches or the running of some statute of limitations are naturally in the main the acts of filling in and reclaiming portions of the former bed of the lake. The bill recites that most of these acts had been done recently (Abst. 5; Rec. 14) and, therefore, as to them the defense of laches and statute of limitations would not apply at all events; but if these acts had been ever so remote in the past they are not of a nature which set the statute of limitations running, or on behalf of which the defense of laches could be invoked. It is notorious that the dumping of material is not a pecuniary sacrifice, but is a privilege—something which is ordinarily paid for. Such acts do not constitute the kind of possession which is ordinarily called adverse and which may ripen into a title by limitations.

2 C. J. 70, 71, 72.

XLI.

EVEN AS AGAINST PERSONS OTHER THAN INDIANS, AN ADVERSE POSSESSION OF THE SHORE LANDS CAN NEVER GIVE RIGHT OR TITLE IN THE SUBMERGED LANDS.

By what possible stretch of the imagination can this court be asked to assume—and to assume as a matter of judicial knowledge—that the lands which are still submerged and the seizure of portions of which is threatened, have been held adversely and held for a length of time to ripen into a title? If any such long continued adverse possession can be claimed of any of the shore lands, the claim cannot extend to the submerged lands. Adverse possession of shore lands can never give right or title in lands which are submerged.

Farnham on Water and Water Rights, Sec. 837.

2 Corpus Juris, 71, 72.

XLII.

THE NATURE OF THE INDIAN TITLE WHICH EXISTED PRIOR TO THE GREENVILLE TREATY IS ENTIRELY IMMATERIAL, FOR COURTS CANNOT GO BEHIND A TREATY.

Defendants rely upon the claim that the Indian title is one of occupancy—a *pedis possessio* title; which never attached to the bed of Lake Michigan because it was incapable of occupancy and which the Indians lost by removing from the vicinity. This is one of the theories in fact upon which the court below decide this case. We have shown elsewhere that the whole course of conduct of the Government to-

wards the Indians, including its many treaties, contradicts that theory. (See No. II, VII, VIII, *ante.*) But if this theory were otherwise tenable, it has no place in the present instance for the reason that by the Greenville Treaty the United States relinquished its entire title to the Indians and made the Indian title one in fee simple. (See No. IV *ante.*) The question, therefore, of the nature of the original Indian title becomes immaterial, for the courts cannot go behind the Greenville Treaty.

Fellows v. *Blacksmith,* 19 How. 366.

In *United States* v. *Paine Lumber Company,* 206 U. S. 467, *the Indian title was based upon a treaty,* and Mr. Justice McKenna pointed out that the case of *Johnson* v. *M'Intosh,* 8 Wheat. 574, ordinarily relied on as establishing that the Indian title was that of occupancy, did not apply.

> "Such is not the title," the opinion of the court reads. "We need not, however, exactly define it. It is certainly more than a right of mere occupation. *The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. Libby* v. *Clark,* 118 U. S. 250."

We may quote some remarks by Mr. Justice McLean in *Worcester* v. *Georgia,* 6 Pet. 515, 593:

> "So long as treaties and laws remain in full force, * * * judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional."

XLIII.

EVEN OF SOME OR ALL OF THE POTTAWATOMIE NATION HAVE BECOME CITIZENS THAT WOULD NOT AFFECT THEIR TITLE TO THE PROPERTY. AN INDIAN RETAINS ALL HIS RIGHTS TO TRIBAL PROPERTY NOTWITHSTANDING THAT HE MAY HAVE BECOME A CITIZEN.

The first ground for the motion to dismiss the amended bill, as stated by the defendant, City of Chicago (Abst. 33; Rec. 68), is "that proper parties complainant are not joined and facts sufficient to constitute a valid cause of action in equity against this defendant, are not stated." And the second ground is apparently an enlargement of the first ground. The point evidently sought to be made is that the bill is brought by individuals and not by the tribe or nation itself. The bill avers that it is brought by certain individuals for officers and members of the business committee of one of the constituent bands of the Pottawatomie Nation, and that they bring it on behalf of themselves and of the entire band and nation. This has been held to be the proper method of bringing forward the claim of an Indian tribe or nation.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294.
United States v. *Old Settlers*, 148 U. S. 427.
United States v. *Cherokee Nation*, 202 U. S. 101.

In *Heckman* v. *United States*, 224 U. S. 413, 436, Mr. Justice Hughes said:

> "That the conferring of citizenship was in no wise inconsistent with the retention of control

over the disposition of the allotted lands was expressly declared in the case of *Tiger* v. *Western Invest. Co.*, 221 U. S. 286; 55 L. Ed. 738; 31 Sup. Ct. Rep. 578, in which the conclusions of the court were thus stated:

"'Conceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship, unnecessary to here discuss, he was still a ward of the nation so far as the alienation of these lands was concerned, and a member of the existing Creek Nation. * * * Upon the matters involved, our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that in the present case, when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease; and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian.'"

In *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, *supra*, Mr. Justice White recites in the statement of facts (p. 560):

"On June 6, 1901, a bill was filed on the equity side of the Supreme Court of the District of Columbia, wherein Lone Wolf (one of the appellants herein) was named as complain-

> ant, suing for himself as well as for all other members of the confederated tribes of the Kiowa, Comanche, and Apache Indians, residing in the territory of Oklahoma. The present appellees (the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office) were made respondents to the bill. Subsequently, by an amendment to the bill members of the Kiowa, Comanche, and Apache tribes were joined with Lone Wolf as parties complainant."

And the right to bring the action in that manner does not even seem to have been challenged.

In *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, Mr. Justice White maks the following a part of his statement of facts (page 295):

> "This cause was begun on the equity side of the Supreme Court of the District of Columbia. The complainants named in the bill were the Cherokee Nation, and its principal chief and treasurer and sundry other citizens of the nation, suing on behalf of themselves and of citizens of the nation residing in the Indian territory. Ethan A. Hitchcock, as Secretary of the Interior, was made sole defendant. It was claimed in the bill that, by virtue of certain treaties and a patent based thereon, the Cherokee Nation was vested with a fee-simple title to its tribal lands in the Indian territory, and it was also averred that, by a treaty executed in 1835, there was secured to the nation the right, by its national council, to make and carry into effect all such laws as the Cherokees might deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as had connected themselves with them."

In the opinion of the court, Mr. Justice White says (page 300):

> "Preliminary to considering the fundamental question raised by the demurrer, it is necessary to notice two subjects not expressly referred to in the opinion below. They are, first, the objection to the formal sufficiency of certain of the averments in the bill; and, second, the claim that the Cherokee Oil & Gas Company was an indispensable party defendant. With respect to the first-mentioned ground of objection, without going into detail, we think the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked."

In *United States* v. *Old Settlers,* 148 U. S. 427, the following is in the statement by Mr. Chief Justice Fuller (page 427):

> "The original petition was filed March 8, 1889, and the substituted petition, January 23, 1890, and thereby the petitioners, Bryan, Wilson and Hendricks, purporting to act for themselves, and as the commissioners of the 'Old Settlers,' or 'Western Cherokee' Indians, represented that the latter are that part of the Cherokee race of Indians which formerly composed the Western Cherokee Nation, and which subsequently became known as the 'Old Settlers,' and that for the purpose of prosecuting their claims against the United States government they had appointed Bryan, Wilson and Hendricks as their commissioners to represent and in their names and for their benefit to do and perform any and all acts and things necessary and proper to be done by them in the premises."

And in the opinion of the court (481):

> "We approve of this disposition of the matter as just and appropriate under the circumstances, and a competent exercise of judicial

power. The court decides and pronounces the decree to be carried into effect as between the persons and parties who have brought the case before it for decision, and none the less so, because it leaves the mere matter of distribution to be conducted in the manner and through the agencies pointed out in the treaty."

And in *United States* v. *Cherokee Nation,* 202 U. S., 101, 127, the following is quoted with approval by Mr. Chief Justice Fuller:

> "While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty."

In *Pam-To-Pee* v. *United States,* 148 U. S. 691, the following was cited by Mr. Justice Shiras (page 699):

> "In pursuance of the provisions of this statute, on the 14th of April, 1890, a petition was filed in the Court of Claims by the Pottawatomie Indians, by their agent and attorney, John Critcher, and on the 5th of November, 1890, another petition by the Pottawatomie Indians, by their agent and attorney, John B. Shipman. The United States objected to the filing of two petitions, and the court below, overruling a motion to dismiss the latter petition, consolidated the causes, and dealt with them as one. The two classes of claimants unite in the appeal to this court."

Page 704:

"In each case it appears that by special appointment the attorneys represent some of the Pottawatomies who remained in the states of Indiana and Michigan, under the supplementary article of the treaty of September 27, 1833. In this view of the statute the court allows the motion of the defendants to consolidate the cases made on the 8th day of January, 1891, and overrules the motion to dismiss cause No. 16,842, made on the 19th day of January, 1891. This brings the issue by both the petitioners to the consideration of the court, to be disposed of upon one broad ground of the right of all the Pottawatomies of Michigan and Indiana. Congress have recognized by the very title of the Act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, *leaving the question of distribution to that department of the government,* which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians."

Page 705: ,

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund."

In *Smith* v. *Swormstedt,* 16 How. 288, 302, the following is in the opinion of the court:

"An objection was taken, on the argument to the bill for want of proper parties to maintain the suit. We think the objection not well founded. The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all,

> some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." Citing authorities.

The foregoing are only a few of the many cases in which this right by a few representatives to bring an action on behalf of a numerous class, and particularly in cases of actions on behalf of Indian tribes or nations, is fully recognized.

An argument was presented in the court below also that the complainants herein are not entitled to bring the action because, as stated in *Pam-To-Pee* v. *United States, supra* (page 705), "these petitioners no longer have any tribal organization." The petitioners to whom the opinion of the court refers in case No. 1125 are not the Pokagun band. This can be more clearly seen upon reference to the two cases of *Pam-To-Pee* v. *United States,* 187 U. S. 371, by which the petitioners referred to as not under tribal organization had unsuccessfully sought to share in the fund which was distributed under the decision of the first *Pam-To-Pee* case.

If they did not have tribal organization, however, the merits of the case would not be affected, for the bill is brought on behalf of the entire Pottawatomie nation, including those who are citizens and not members of any tribal organization, as well as on behalf of those who are. But citizenship would not debar them from asserting their rights to tribal property. Section 2119 R. S. (1 Kappler, 35) provides:

> "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life (and every Indian in Indian Territory), is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States *without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.*"

The defendants also contend that this suit is not properly brought in equity, because it is a bill to quiet title, and the complainants are not in possession of at least a portion of the lands. This court, however, said in *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 531:

> "But without questioning in the slightest degree the doctrine expounded or the conclusion reached in the *Taylor* case, we think it can here have no application, since we are of the opinion that the assumption that the cause of action alleged in the bill under consideration is the equivalent of a suit in ejectment is wholly without foundation. We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any rights under its lease, and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after deter-

mining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given to such approval.

"It is said, however, if the bill be thus construed, the suit is in substance one to quiet title, and, under the well-settled rule, such a suit can be brought only by one in possession. *Whitehead* v. *Shattuck*, 138 U. S. 146, 34 L. Ed. 873, 11 Sup. Ct. Rep. 276; *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, 47 L. Ed. 626, 23 Sup. Ct. Rep. 434. But this contention overlooks the reason upon which the rule is based, as pointed out in the cases relied upon, which is that one out of possession has an adequate remedy at law by a suit in ejectment. As it is conceded that the legal remedy was not here available, and that there was hence jurisdiction in a court of equity to determine the right of possession, it is clear that the rule has no application, and that the court had equitable jurisdiction to determine all the issues presented by the bill."

Equity Rules, Nos. 23 and 38 are additional reasons for bringing this suit in equity. These are as follows:

23. "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court."

38. "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court one or more may sue or defend for the whole."

It is evident, therefore, that the objections of the defendants for want of proper parties and because of an alleged remedy at law, are not well taken.

XLIV.

SO LONG AS TREATIES AND LAWS REMAIN IN FULL FORCE THE JUDICIAL POWER CAN EXERCISE NO DISCRETION IN REFUSING TO GIVE EFFECT TO THOSE LAWS WHEN QUESTIONS ARISE UNDER THEM, UNLESS THEY SHALL BE DEEMED UNCONSTITUTIONAL.

There is no pretense, of course, that the Greenville Treaty has ever been repealed or annulled. There is no pretense that the United States had not the power to enter into that treaty with the Indians. It remains in full force. The treaty was not abrogated by any of the subsequent treaties with the Indians, but on the contrary, confirmed. It was not abrogated when Illinois was admitted into the union as a state and when even most of its upland bordering on Lake Michigan was still the property of the Indians. No part of Lake Michigan had then been ceded to the United States, nor since then, and Illinois has at no time acquired title to its bed or islands. Never having had such title, it could give none to any of the defendants by any of the several statutes referred to in the bill of complaint. The complainants have as much right now to come into court and ask the protection from unlawful seizures guaranteed them under the Greenville Treaty as their ancestors had the day after that treaty was signed. "The Laws and Treaties," says Justice McLean in his concurring opinion in the

case of *Worcester* v. *Georgia,* 6 Pet. 505, 594, "which imposed duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the Federal government."

See also:

Fellows v. *Blacksmith,* 19 How. 366.

By no process of reasoning can it be claimed that the Greenville Treaty is no longer in force and that any authority resides in the courts to disregard it. This is all the more so in the case not merely of personal or political rights, but of vested property rights under a treaty which had conveyed title like a government patent, and which title has at no time been parted with, lost or impaired.

XLV.

ANY AND ALL ACTS OF THE DEFENDANTS IN SEIZING ANY OF THE LANDS IN QUESTION, OR EVEN MAKING VALUABLE OR LASTING IMPROVEMENTS THEREON, CANNOT AFFECT THE TITLE OF THE COMPLAINANTS, FOR THE DEFENDANTS WERE BOUND TO TAKE NOTICE OF THE GREENVILLE TREATY AND OF ITS PROVISIONS.

To the extent that the defendants are relying upon length of possession as to any of the lands they are not in a position to invoke either laches, estoppel or any statute of limitations. The bill avers notice to defendants of complainants' rights (Trans. 5; Rec. 14). But it was not necessary at any time to give

them notice of the Indian claim of title, but they must be conclusively presumed to have had notice of it all the time. The Greenville Treaty and all its provisions were notice to all the world of the Indian claim.

We have heretofore had occasion to refer to the case of *Heckman* v. *United States*, 224 U. S. 413, in which many thousands of patents were annulled by a suit in equity as being in violation of restriction against alienation imposed upon the Indians and as being in violation of treaty rights. What makes that case more striking is that the Indians to whom the property was restored had received consideration for their conveyances, but this court, speaking by Mr. Justice Hughes, said (page 446):

> "It is said that the allottees have received the consideration, and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. *The restrictions were set forth in public laws, and were matters of general knowledge.* Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States* v. *Trinidad Coal & Coking Co.*, 137 U. S. 160, 170, 171; 34 L. Ed. 640, 644; 11 Sup. Ct. Rep. 57."

In *United States* v. *Carpenter*, 111 U. S. 347, Mr. Justice Field, speaking for the court, said:

> "It matters not whether the land had been surveyed or not, *the Treaty was notice* that a part of the quarry would be retained by the government and that the whole might be for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department."

XLVI.

THE FACT THAT PEOPLE INVESTED OR LOANED MONEY ON LAND, THE TITLE OF WHICH IS IN THE INDIANS, DOES NOT GIVE SUCH PARTIES ANY CLAIM TO SUCH LANDS NOR STRENGTHEN THE TITLE ADVERSELY TO THE INDIANS.

See:

Leavenworth, etc. R. R. Co. v. *United States*, 92 U. S. 733.

Also:

No. XXXIII *ante* and No. XLVII *post*.

XLVII.

NONE OF THE DEFENDANTS CAN ACQUIRE TITLE BY MERE ACTS OF SEIZURE OR POSSESSION NO MATTER HOW LONG CONTINUED. EVEN A DIRECT CONVEYANCE TO THEM BY THE INDIANS WOULD HAVE GIVEN THEM NO TITLE AND THEY CANNOT ACQUIRE TITLE INDIRECTLY WHICH THEY COULD NOT HAVE ACQUIRED BY DIRECT CONVEYNANCE.

A CONVEYANCE MADE IN VIOLATION OF A TREATY WILL NOT EVEN CREATE AN EQUITABLE ASSET IN THE GRANTEE, ALTHOUGH HE MAY HAVE PAID ALL THE PURCHASE MONEY AND HAVE TAKEN ACTUAL POSSESSION OF THE LAND.

The argument persistently made on behalf of the defendants in the court below was that the Indians had lost their title owing to their failure to assert it for many years. We have heretofore pointed out reasons why neither laches, statute of limitations nor estoppel can be invoked against the complainants as Indians nor even if the complainants were competent. But, after all, when any one loses title to land because of laches or statute of limitations or by estoppel, it is a species of conveyance by sufferance or inaction. It will be readily granted that if the Indians could not part with their title by affirmative action, i. e., by a conveyance, it must follow that they cannot part with it by sufferance.

But the complainants are Indians, they are the wards of the Nation, and whether some of them have or have not become citizens, the wardship continues as long as the restriction upon alienation remains.

The Greenville Treaty provides that in the event of sale the lands shall be sold only to the United States. In such a state of facts there is no way by which the Indians voluntarily or involuntarily can part with the title unless by the affirmative action of both the Government and the Indians or at least by the former as trustee. Against apparently very strong opposition this principle was affirmed in many cases. Thus we have seen in *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733; in *Heckman* v. *United States,* 224 U. S. 413, 446, and in *Northern Pacific Railway Co.* v. *United States,* 227 U. S. 355, immense tracts of land involving enormous values and invalidating tens of thousands of titles (some of them of considerable antiquity) were restored to the Indians. We will quote from *Mullen* v. *Simmons,* 234 U. S. 192, at page 198:

> "This court said, in *Starr* v. *Long Jim,* 227 U. S. 613, 625; 57 L. Ed. 670, 675; 33 Sup. Ct. Rep. 358, that the title to lands allotted to Indians was 'retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence.' It was held, applying the principle, that a warranty deed made by Long Jim at a time when he did not have the power of alienation 'was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel,' after he had received a patent for the land.
>
> "The principle was applied again in *Franklin* v. *Lynch,* 233 U. S. 269, *ante,* 954; 34 Sup. Ct. Rep. 505, and its strict character enforced against the deed of a white woman who acquired title in an Indian right. It is true, in these cases the act of the Indian was voluntary or contractual, and, it is contended, a different effect can be ascribed to the wrongs done by an

Indian, and that in reparation or retribution of them the state law may subject his inalienable lands—inalienable by the national law—to alienation. The consequence of the contention repels its acceptance."

What has been said under other headings need not be here repeated, but we will content ourselves with a reference to the following cases:

Clark v. *Akers,* 16 Kas. 166.
Leavenworth, etc. R. Co. v. *United States,* 92 U. S. 733.
Best v. *Doe,* 85 U. S. 112.
Heckman v. *United States,* 224 U. S. 413, 446.
Rice v. *Minn., etc. Ry. Co.,* 66 U. S. 147.
Mullen v. *Simmons,* 234 U. S. 192.
Franklin v. *Lynch,* 233 U. S. 269.

XLVIII.

IF THE UNITED STATES IS TO BE CONSIDERED AS TRUSTEE FOR THE INDIANS IN THEIR TITLE TO THE LAND, THEN THE RULE APPLIES THAT AN AGENT OR REPRESENTATIVE OR OFFICIAL OF A GOVERNMENT CANNOT DEPRIVE IT OF PROPERTY BY TAKING ITS LANDS AND HAVING STREETS AND HIGHWAYS THEREON, OR IN OTHER RESPECT BIND THE GOVERNMENT AS TO SUCH LANDS.

The court below took the view that the United States government has acquiesced in the occupation of some of the lands in question by the defendants and others, and as guardian or trustee for the

Indians must be considered to have waived the Indian title. Such view is not sustained we believe by any reported case, and we doubt whether the defendants can cite any such case. But there is no dearth of authorities the other way. That neither any officer of the government nor even Congress can deprive the Indians of vested rights in property any more than they can deprive others, is too well established to require extended comment. An officer or agent of the government cannot bind even the government beyond the plain scope of authority given him by law. We refer to the following cases among many:

Leavenworth, etc. R. R. Co. v. *United States,* 92 U. S. 733.
United States v. *Chicago,* 48 U. S. 185.
I. C. R. R. Co. v. *Illinois,* 146 U. S. 387.
United States v. *Morrison,* 203 Fed. 364.
Stone v. *United States,* 2 Wall. 525.
United States v. *Carpenter,* 111 U. S. 347.

XLIX.

THE SOLE EXCEPTION TO THE ABSOLUTE RIGHT OF SOIL IN THE INDIANS, EVEN INDEPENDENTLY OF THE TREATY OF GREENVILLE, WAS THAT IMPOSED BY IRRESISTIBLE POWER WHICH EXCLUDED THEM FROM INTERCOURSE WITH ANY OTHER EUROPEAN POTENTATE, AND IMPOSED RESTRICTIONS UPON ALIENATION OF THEIR LAND ACCORDINGLY.

To understand better the absolute nature of the Indian right of soil, even independently of the Greenville Treaty, notwithstanding the terms "per-

petual right of occupancy, of possession, etc.," which the defendants are apparently misconstruing, it is helpful to revert to the view of Chief Justice Marshall in *Worcester* v. *Georgia,* 515, 559, in which he said:

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, *with the single exception* of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians."

The political rights of the Indians as semi-independent communities, have by this time almost entirely disappeared, but their right of property remains. As shown elsewhere in this brief, the Government or Congress can change the political status or the personal rights of the Indians, but it is powerless even by affirmative legislation to deprive them of property rights vested by Treaty. The right of property acquired under the Greenville Treaty is still protected by that treaty and by the Constitution.

L.

"IN THE RECORD OF JUDICIAL DETERMINATIONS OF THIS COURT THERE ARE FEW DECISIONS OF GREATER IMPORTANCE THAN THOSE WHICH WERE PRONOUNCED IN CHEROKEE NATION V. GEORGIA, 5 PET. 1; WORCESTER V. GEORGIA, 6 PET. 515."

The case of *Worcester* v. *Georgia, supra*, is of itself ample authority to sustain the complainants' bill. The defendants seemed to recognize this, and in the court below the authority of that case was sought to be minimized by attacks made on Chief Justice Marshall's public and private life. Yet many years later in *United States* v. *Lariviere* (43 Gals. of Whiskey), 93 U. S. 188, Mr. Justice Davis said:

> "In the record of the judicial determinations of this court there are few decisions of greater interest and importance than those which were pronounced in *Cherokee Nat.* v. *Ga.*, 5 Pet. 1, and *Worcester* v. *Ga.*, 6 Pet. 515. Chief Justice Marshall, in these cases, with a force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived."

LI.

THE VALIDITY OF A LEGISLATIVE ACT INCLUDING TREATIES, DEPENDS IN NO DEGREE ON ITS CONTAINING THE TECHNICAL TERMS USED IN A CONVEYANCE.

If we are right in our contention that the Greenville Treaty passed to the Indians the entire title

of the government to the lands in question, then it was for all intents and purposes a warranty deed conveying a title in fee simple. The fact that the language of the conveyance in the treaty was couched in terms that were intelligible to the Indians did not detract from the fee simple character of the conveyance. The complainants have just as much right to ask for the protection of the courts to protect that title, at least as though a warranty deed in fee simple had passed to their ancestors and that title had remained undisturbed up to the present time. They are as much entitled to that protection as would be the owners of any estate the title to which had remained undisturbed in the same family for several generations,—say since 1795. In *Rutherford* v. *Greene's Heirs,* 2 Wheat. 196, 198, Chief Justice Marshall said:

> "It has been said that to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given,' so as to read, 'shall be allotted for, and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends in no degree on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

This language was quoted and reaffirmed by Mr. Justice Brown on behalf of this court in the case of the *New York Indians* v. *United States,* 170 U. S. 1, 16. The effect of the clause of relinquishment by

the United States to the Indians contained in the Greenville Treaty was to vest in the Indians a fee simple title to the same extent as though a technical warranty deed had been given them, qualified only in respect to the right of alienation.

LII.

THE HABENDUM CLAUSE OF A GRANT IN A TREATY AS WELL AS A DEED MAY EXPLAIN, ENLARGE OR QUALIFY, BUT CANNOT CONTRADICT OF DEFEAT THE ESTATE GRANTED BY THE PREMISES.

The granting clause of the Greenville Treaty is as follows (2 Kappler, 41):

> "The United States relinquish their claims to all other Indian lands northward of the River Ohio, eastward of the Mississippi and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the King of Great Britain, in the treaty of peace made between them in the year 1783."

The *habendum* clause is as follows (2 Kappler, 42):

> "The Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them shall be disposed to sell their lands, or any part of them, *they are to be sold only to the United States; and until such sale,* the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same."

It is this language which the defendants contend made for the Indians a title merely of a *pedis possessio* occupancy, not extending to parts of lands actually occupied, and disappearing with even a temporary cessation of that occupancy. The judge in the court below took the view that he "could not compel" the Indians to occupy these lands and hence refused to give them any relief to repossess them of their lands. Anent this state of facts, the following from the opinion of Mr. Justice Brown in *New York Indians* v. *United States,* 170 U. S. 1, 20, is illuminating:

> "While the granting clause is in the future tense, an agreement to set apart, the *habendum* clause is in the present tense: 'To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An Act to Provide for an Exchange of Lands with the Indians Residing in any of the States or Territories, and for their Removal West of the Mississippi,' approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said land among the different tribes, nations, or bands in severalty, with the right to sell and convey to and from each other.' The object of the *habendum* clause is said to be 'to set down again the name of the grantee, the estate that is to be made and limited, or that the time the grantee shall have in the thing granted or demised, and to what use.' Sheppard's Touchstone, 75. It may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted by the premises, and where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the *habendum* performs the office of defining, qualifying, or controlling it. Jones, Real Prop., Sec. 563; Devlin, Deeds, Sec. 215.

"In this case, if the *habendum* clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and *habendum* clauses. Admitting that the former, if standing alone, would engender a doubt as to when the grant should take effect, the *habendum* clause removes that doubt, and imports a present surrender of a defined tract." See also *Worcester* v. *Georgia*, 6 Peters, 515, 553.

LIII.

TITLE TO THE LANDS IN QUESTION BY THE DEFENDANTS, OR ANY OF THEM, DIRECTLY OR INDIRECTLY, COULD ONLY HAVE BEEN ACQUIRED EITHER FROM THE UNITED STATES OR FROM THE STATE OF ILLINOIS. IF THE UNITED STATES EVER HAD TITLE PRIOR TO THE ADMISSION OF ILLINOIS AS A STATE, THEN THAT TITLE PASSED TO THE STATE UPON ITS ADMISSION. THE ONLY CESSION WHICH HAD AT THAT TIME BEEN MADE BY THE INDIANS WAS THE ONE BY THE TREATY OF ST. LOUIS IN 1816, WHICH, BY ITS LANGUAGE AND THE SURVEY MADE UNDER IT (REPRODUCED IN THE RECORD AS PAGE 35 AND SHOWN BETWEEN PAGES 18 AND 19 OF THE ABSTRACT) RAN TO THE SHORE OF LAKE MICHIGAN ONLY. AS THE STATE UPON ITS ADMISSION TOOK ONLY THE TITLE OF THE UNITED STATES AND HAS ACQUIRED NONE SINCE THEN, IT FOLLOWS THAT THE STATE COULD GIVE NO TITLE TO ANY OF THE DEFENDANTS.

In *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, this court held that the land in question was the property of the State of Illinois in trust for public uses for which they are adapted. This was upon the theory that when Illinois was admitted as

a state into the union it was so admitted on terms of equality with all other states, and hence with the title to the submerged lands in the lakes. That case, however, was decided without any reference to the Indian title and the Indians were not parties to the case. But this court is equally committed to the doctrine that when the United States has not the title to lands submerged under navigable waters at the time a state is admitted, the state takes no title upon its admission. "The well settled doctrine," said this court in *Knight* v. *United States Land Association*, 142 U. S. 161 (at page 185), "that upon the acquisition of the territory from Mexico the United States acquired the title to lands under tide water in trust, does not apply to lands that had been previously granted to other parties by the former government, subjected to trusts which would require their disposition in some other way," citing *San Francisco* v. *LeRoy*, 138 U. S. 656. This was repeated in *Shively* v. *Bowlby*, 152 U. S. 1; in *United States* v. *Winans*, 198 U. S. 371, 382, and in other cases.

In the last named case it was said:

> "It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union. In other words, it is contended that the state acquired by its admission into the Union 'upon an equal footing with the original states,' the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could

neither grant nor retain rights in the shore or to the lands under water.

"The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby*, 162 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced, opposing the *dicta* scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"'Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

* * * * * *

"'By the Constitution, as is now well settled, the United States having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition. *American Ins. Co.* v. 356 *Bales of Cotton*, 1 Pet. 511, 542, 7 L. ed. 243, 255; *Benner* v. *Porter*, 9 How. 235, 242, 13 L. ed. 119, 122; *Cross* v. *Harrison*, 16 How. 164, 193, 14 L. ed. 889, 901; *First Nat. Bank* v. *Yankton County*, 101 U. S. 129, 133, 35 L. ed. 1046, 1047; *Murphy v. Ramsey*, 114 U. S. 15, 44, 29 L. Ed. 47, 57, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 1, 42, 43, 34 L. Ed. 478, 490, 491, 10 Sup. Ct. Rep. 792; *McAllister* v. *United States*, 141 U. S. 174, 181; 35 L. Ed. 693, 695, 11 Sup. Ct. Rep. 949."

"Many cases were cited. And it was further said:

"'We cannot doubt, therefore, that Congress has the power to make grants of land below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.'

"The extinguishment of the Indian title opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory."

Let us look at the situation as it existed when Illinois was admitted as a state in 1818. For twenty-three years the Indians had been the owners in fee simple of all the lands bordering upon Lake Michigan of substantially all the islands in it, and of all the submerged lands of the lake, with one exception. That exception was the cession of six miles square included in the present site of Chicago, by the treaty of Greenville, and the same with other lands, by the treaty of St. Louis two years previously. That treaty had ceded upland only, "to a point on Lake Michigan ten miles northward of the mouth of Chicago Creek; thence, along the lake, to a point ten miles southward of the mouth of said Chicago Creek; thence in a direct line to a point of the Kankakee, etc."

At that time not a foot of the submerged lands of the lake, or of any island therein, had been acquired by the United States government from the Indians, and the United States had no title to any of it. The title was then in the Indians, had been even when the United States in 1783 had succeeded to the rights of Great Britain, and it was confirmed and strengthened by the Greenville Treaty of 1795. Upon the authority of the foregoing cases Illinois took no title to any of the lands then under the waters of the lake, nor to any island therein, upon its admission. When and how did Illinois acquire any such title to convey or grant, as it has attempted to do in the numerous acts of its legislature attacked in our bill? We challenge an answer to this question.

LIV.

THERE CAN BE NO CLAIM OF TITLE UPON THE THEORY OF ABANDONMENT. AFFIRMATIVE ACTION IS REQUIRED ON THE PART OF THE INDIANS AND ALSO A LEGISLATIVE OR JUDICIAL PROCEEDING IN THE NATURE OF AN INQUEST OF OFFICE TO CONSTITUTE AN ABANDONMENT OF TITLE. MERE FAILURE TO ASSERT TITLE IS NOT SUFFICIENT.

We now come to the main theory of the defense, the one upon which the court below mainly based its decision. That theory is that the complainants had "abandoned" the lands in question by removing from the vicinity in or shortly after the year 1833. The theory of title acquired by abandonment has received some attention at the hands of the courts in the case of personal property as between persons

sui juris. It would serve no useful purpose to collate or analyze the general authorities upon this subject, for it has received attention at the hands of this court specifically in the case of Indians. *Mitchel* v. *United States*, 9 Pet. 711, was a case which arose in Florida, and one of the questions was whether the Seminole Indians had abandoned title to certain of their lands. Firstly, let it be noted that the abandonment there claimed to have taken place was before the time Florida had been ceded by Spain to the United States. This court held that the effect of abandonment was to be determined by the rules of law, not of the United States, but of those of the government under whose laws the acts arose. The court there said (page 749):

> "It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them by any regulation, by treaty or promise made to them by his authority."

In that case the Indian title did not rest upon any such footing as a treaty like that of Greenville, nor even upon the ordinary title held by Indians under British domination; yet the court looked upon that title as one of perpetual right of occupancy or possession. Under Spanish dominion, to which Florida had been subject previous to its acquisition by the United States, the theory did not obtain (as it has under the United States, and probably also had under Great Britain), that originally the Indians were the owners of *all* the lands (Indian Land Cessions, page 535). Under the Spanish regime "No claim by the natives to unoccupied lands or unoccupied territory appears to have been recognized. Such territory was designated as 'waste lands' and formed part of the Royal Domain" (Indian Land Cessions, p. 539). Yet, even under the Spanish government no title could be based on any alleged abandonment by the Indians unless, or until, a legal proceeding or an inquisition and a judgment or decree in the nature of "office found" had been reached. Such a proceeding had been had in another case arising in Florida, viz., *Arredondo* v. *United States,* 13 Pet. 133, 135.

Bearing that in mind, we may now proceed to quote from the *Mitchel* case at page 742:

> "The counsel of the United States pressed in argument the decision of this court in the case of *Arrendondo,* as an affirmance of the right of the intendant of the province, or of Cuba, to grant Indian lands. In that case the lands granted had been in the possession and occupation of the Alluchua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and

before any grant was made by the intendant, a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment, on which it was decreed that the land had reverted to and become annexed to the royal domain.

"Considering this to be a judicial act in the nature of an inquest of office, and the decree of the intendant as making the fact a *res adjudicata,* we did not feel at liberty to look behind it for evidence on which it was founded; the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretense of a similar proceeding having been had in relation to these lands, nor could there well be in opposition to the evidence in the record, especially the report of the assessor-general in 1817, that they were the lands of the Seminoles at the time of the cession by them and the confirmation by Governor Folch. By the common law the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office found so as to annex it to his domain (citing authorities). * * * Such, too, seems to be the law of Spain in the Floridas and Cuba, as appeared in the case of *Arredondo,* and as it must have been understood by the Spanish authorities, when they acknowledged the Indian right to lands in the harbor of Pensacola to be an existing one in 1816. Nor is there any evidence in the record that their right ceased to be respected, or that lands which had been in their possession became annexed to the royal domain, till some official proceeding, founded on the law of Spain, in the na-

ture of an office by the common law, had taken place under the proper authority. (White, 25, 40, 37.)

"The United States have acted on the same principle in the various laws which Congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves on the validity of such claims without the previous action of some tribunal, special or judicial."

Such a legal proceeding as that of "office found" must be instituted even where a cause arises for determining a grant which had been given with a condition subsequent; the grant does not *ipso facto* lapse. Thus in *New York Indians* v. *United States*, 170 U. S. 1, 24:

"In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the government might declare a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands, and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may re-enter in the case of the breach of a condition subsequent, and the government, which can only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of *United States* v. *Repentigny*, 72 U. S., 5 Wall. 211, 267 (18: 627, 646), in which the court said: 'We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subjected to the legisla-

lative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government, without these preliminary proceedings.' Practically the same language was used with reference to a grant of lands in aid of a railroad in *Schulenberg* v. *Harriman,* 88 U. S., 21 Wall. 44, 63 (22: 551, 555); in *Farnsworth* v. *Minnesota & P. R. R. Co.,* 92 U. S. 49 (23: 530), and in *Van Wyck* v. *Knevals,* 106 U. S. 360 (27: 201). In *St. Louis, I. M. & S. Rwy. Co.* v. *McGee,* 115 U. S. 469 (29: 446), it was said: 'That legislation to be sufficient (for that purpose) must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and *free from all doubt or ambiguity.*' See also *New Orleans-Pacific Railway Co.* v. *United States,* 124 U. S. 124 (31:383). As there is no pretense that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the government. * * *

"While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance. * * *

Of course, if the legal title passed to these Indians, something else than a failure to assert such title is necessary to divest it. * * * *To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case.*"

These cases are conclusive of the "abandonment" theory.

LV.

AT LEAST, CESSATION OF OCCUPANCY MUST BE IN PURSUANCE TO AGREEMENT OF CESSION TO CONSTITUTE ABANDONMENT.

In the court below defendants relied upon some expressions in cases to the effect that no one is permitted to settle upon the Indian lands until after the extinguishment of the Indian title and abandonment by the Indians. We believe it will be found that both of these elements must exist, viz., the extinguishment of the Indian title *and* abandonment; or else the abandonment must be in pursuance to the agreement of cession, and in that case the abandonment is construed as a carrying out of the agreement and in pursuance of it. Quoting from *Buttz* v. *No. Pac. R. R. Co.*, 119 U. S. 55:

> "The agreement, however, on the part of the Indians was only to cede their title, it was not a cession in terms by them. The officers of the Land Department, however, treated it as an actual cession of title from its date. The Indians had then retired to the Reservation set apart for them by the treaty of 1867, thus giving up the occupancy of the other lands. The relinquishment thus made was as effectual as a formal act of cession. Their right of occupancy was, in effect, abandoned, and *full consideration for it being afterwards paid, it could not be resumed.* The agreement in terms provided that it should be binding from its ratification. So, therefore, *considered in connection with the actual retirement of the Indians from the land,* it may properly be treated as establishing the extinguishment of their title from its date, so far as the United States are concerned.
>
> * * * * * *

"If we are mistaken in this view, and the relinquishment of the right of occupancy by the Indians is not to be deemed effected until the agreement was ratified by Congress in June, 1874, notwithstanding their actual retirement from the lands, the result would not be changed."

As the complainants never ceded this land, or agreed to cede it, there was no abandonment.

LVI.

THE CLAIM OF THE DEFENDANTS THAT THE INDIANS PARTED WITH THEIR TITLE BY THE TREATY OF TIPPECANOE RIVER OF OCTOBER 27TH, 1832, IS NOT TENABLE. THAT TREATY, IN CONCEDING TO THE UNITED STATES "THEIR TITLE AND INTEREST TO LANDS IN THE STATES OF INDIANA, ILLINOIS AND IN THE TERRITORY OF MICHIGAN SOUTH OF THE GRAND RIVER," DID NOT CEDE THE LANDS IN QUESTION. MILLIONS OF ACRES WERE STILL CEDED BY THE TREATY OF CHICAGO OF SEPTEMBER 26-27, 1833. (2 Kappler's Ind. Aff. 402.) WHAT WAS CEDED IN THE FORMER TREATY WAS THE INTEREST OF THE PARTICULAR BANDS TO THE LANDS CEDED ON THE DAY PREVIOUS BY THE OTHER CHIEFS OF THE POTTAWATOMIE NATION (2 Kappler's Ind. Aff. 367) AND DID NOT INCLUDE THE LANDS IN QUESTION. OTHERWISE THIS CESSION WOULD BE VOID FOR UNCERTAINTY, AS IT IS NOT BY METES AND BOUNDS AND DOES NOT STATE THAT ALL THE LANDS IN THOSE STATES WERE CEDED.

It will be contended by the defendants that by the Treaty of Tippecanoe River of October 27, 1832 (2 Kappler 372), the Pokagon Band, at least, conveyed the property in question to the United States. The

language of this Treaty upon which the claim is based is "The Chiefs and Warriors aforesaid cede to the United States, their title and interest to lands in the United States of Indiana and Illinois, and in the Territory of Michigan, south of Grand River." The land here in question was not part of the Pottawatomie country which was being specially occupied by any constituent band, and the Pokagons had no more interest in it than any other constituent part of the Pottawatomie nation. The question at once suggests itself why should the Government take a conveyance from these "Pottawatomies of the State of Indiana and Michigan Territory," when some five millions of acres of Illinois upland remained still unceded and were only ceded to the Government the following year by the Treaties at Chicago (2 Kappler, 402 and 410)? The answer to the question is that the Government by the Treaty of October 27, 1832, obtained the ratification by these Indians of Michigan and Indiana of cessions of lands made to the Government by other branches of the Pottawatomie tribe or nation which had been made within the preceding few days. See Treaty of October 20, 1832, 2 Kappler, 353, and the Treaty of October 26, 1832, 2 Kappler, 367. In neither of these treaties had any portion of the bed of Lake Michigan or islands therein been ceded. Why, we ask, should such a cession be taken from the Indians of Michigan and Indiana when not taken from the others? Further, it cannot be contended that the Government would take cessions of the submerged lands of Lake Michigan in Illinois without including the portions of the lake in Indiana and Michigan. If

it was the intention to include any of the part of the lake within the boundaries of the state, then territory of Michigan, the cession of lands "in the Territory of Michigan south of Grand River" would be an absurdity.

Further, the court will note that the cession is not of *all lands* BUT *of lands*. If this cession was intended as anything more than a confirmation of these cessions previously made by other bands of the nation on October 20th and October 26, 1832, this cession would be void for uncertainty and for failure to describe any lands at all. We would not even need to invoke the rule of construction favoring Indians in the case of ambiguities.

> "If the subject of the grant cannot be ascertained by its description, the grant becomes void from the necessity of the case."
>
> 3 Wash. Real Prop., 622.

In passing upon the validity of a levy under an execution, the Supreme Court of Illinois, said in *Hughes* v. *Streeter*, 648, 650:

> "There is nothing in the levy to limit and designate the portion of the half of the quarter that he owned. Had it stated that it was *all* of the land which he owned in the tract, or that it was *all* of the land he had acquired by pur chase from a particular individual, or some such reference to something else, by which it could have been located, it might have been sufficient. But we have no such reference, and we have no doubt that the description is so defective that no title whatever passed by the sale. This being the case, the defendant in error did not obtain anything by his purchase."

In *United States* v. *Heirs of Arredondo,* 13 Pet. 133, 135, this court said:

> "If, however, neither Alligator Creek can be found, nor any creek to the west of Alligatortown, entering into the Suwanee, within or at seven miles distance from the town, or a reasonable distance therefrom, and if Alligatortown cannot be found, then it is the opinion of this court that the remaining description in the petition of the locality of the concession is too indefinite to enable a survey to be made, and that the appellees can take nothing under the concession."

And then is to be considered the rule of interpretation to be applied to Treaties with Indians, that nothing is to be construed against them that is not clearly expressed. If the Government had intended to take a cession from this single band of Pottawatomies of any portion of Lake Michigan while taking no similar cession from any of the other constituent bands of that nation, some reason for it would have appeared and the intention would have been clearly expressed. Both reason and expression are absent from the Treaty, and the language of cession used, "south of Grand River," becomes incongruous in the light of such construction.

LVII.

THE GOVERNMENT IS BOUND TO CARRY OUT THE OBLIGATIONS OF A TREATY WITH THE INDIANS IN THE SAME MANNER AS AN INDIVIDUAL WOULD BE BOUND BY A CONTRACT.

If this were an ordinary controversy between individuals, not resting upon treaty obligations, it

could not reasonably be said that because the title had rested, say in the same family for over one hundred years, without change and without anything occuring to affect the title, that such title would be lost by mere lapse of time. The Government is bound to carry out the obligations of a treaty with the Indians in the same manner as an individual would be bound by a contract.

Crews v. *Burcham*, 1 Blk. 352.
United States v. *Reese*, 5 Dill. 409, Fed. Cs. 16-137.
Choate v. *Trapp*, 224 U. S. 665, 674.

LVIII.

A COURT CANNOT AMEND A TREATY BY CONSTRUCTION FROM GENERAL NOTIONS OF CONVENIENCE, ETC.

The real argument of the defendants, of which there was abundant intimation in the court below, was that the lands in question are too valuable to be awarded to the humble Indians. Even if this could be said to be a proper thing to consider, were the terms of the Greenville Treaty capable of any construction against the Indians, that Treaty cannot be actually amended by construction "from mere general notions of policy or convenience."

The Amiable Isabella, 6 Wheat. 1.
Lattimer v. *Poteet*, 10 Pet. 4.
Society, etc. v. *New Haven*, 8 Wheat. 464.
Strother v. *Lucas*, 12 Pet. 410.
Chew-Heong v. *United States*, 112 U. S. 536.
Tucker v. *Alexandroff*, 183 U. S. 424.

LIX.

EVEN TREATING THE INDIAN TITLE AS ONE OF PERMANENT OCCUPANCY THAT TITLE IS SUPERIOR TO THE TITLE OF THE GOVERNMENT AND LIMITS NECESSARILY ITS POWER OF DISPOSAL.

We believe that the terms "right of occupancy," "right of possession," etc., so frequently used in referring to the Indian title were matters of convenience to describe, for want of a more apt term, an inalienable title. However that may be, all the authorities agree that such a title is perpetual and until extinguished is superior to the title even of the Government. Of course, as we have elsewhere pointed out, we believe that the Greenville Treaty confirmed in the Indians a fee simple title to the lands in question. But even if it be treated as a title which is ordinarily called "right of occupancy" or "right of possession," that is perpetual and gives the Indians the full usufructuary right to the lands.

In the well-known case of *Leavenworth, etc. R. R. Co.* v. *United States,* 92 U. S. 733, the court had occasion to speak of the Indian title in the following terms:

> "As long ago as in *Cherokee Nat.* v. *Ga.,* 5 Peters 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *U. S.* v. *Cook,* 19 Wall. 591 (86 U. S. XXII, 210) this right of occupancy has been held to be sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not

peaceably enjoy their possessions with a superior race constantly encroaching on their frontier, with the ultimate fee vested in the United States coupled *with the sole right to buy that right, in case the Indians were willing to sell,* they were safe against intrusion if the Government discharged its duty to a dependent people. And this it has indicated a willingness to do, for in 1834 an Act was passed, 4 Stat. at L., 729, sec. 11, prohibiting, with heavy penalties, a settlement on the lands of an Indian Tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere.* For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever, and whatever changed this condition or interfered with it, violated the guaranties under which they had lived since that date."

In *United States* v. *Lariviere* (43 Gals. of Whiskey), 93 U. S. 188, the court spoke of the Indian title as follows:

> "It is admitted that these Pembina Indians had the same right as other tribes to occupy their lands as long as they pleased, and that this right of occupancy could only be extinguished by voluntary cession to the Government."

For practical purposes, therefore, in the present case it is immaterial whether the Indians' title is one in fee simple or perpetual right of occupancy

or of possession. That perpetual right has not yet been extinguished. Until such extinguishment the Indians are entitled to the full use of their property for all possible, usufructuary purposes. The defendants cannot under the pretext of an abandonment by the Indians locate upon and take possession of this property.

Buttz v. *Northern Pacific R. R. Co.*, 119 U. S. 55.

LX.

IT IS NOT ENOUGH THAT THE COMPLAINANTS' ANCESTORS HAD REMOVED FROM THE VICINITY OF THE LANDS IN QUESTION. THEIR REMOVAL WITHOUT SALE DOES NOT AFFECT THEIR TITLE.

The foregoing is only a restatement of other propositions which we have heretofore endeavored to demonstrate. We refer again to the following cases:

Fellows v. *Denniston*, 5 Wall, 761.
New York v. *Dibble*, 21 How. 366.
United States v. 43 *Gals. of Whiskey*, 93 U. S. (3 Otto), 188.

The view of the court below in the course of the hearing, as at one time expressed, was that the United States, being the guardian of the Indians and having acquiesced heretofore in the possession of some of the lands by the defendants, must be considered to have waived the Indian rights to them. The relation of guardian and ward does not confer the right to confiscate Indian property, and such

property is protected by the 5th Amendment to the Constitution.

Choate v. *Trapp*, 224 U. S. 665, 678.

What the United States could not do by direct governmental or legislative action, it certainly could not be said to have done by implication or failure to act.

Some argument was made in the court below that Congress did have the power to revoke a Treaty even with the Indians, as was held to be the case in *Cherokee Tobacco* v. *United States*, 78 U. S. 616, and in other cases. But it will be found upon examination of those cases that the repeal related not to rights of property vested by treaty, but to what may be termed personal or political rights, which are always subject to control by Congress.

LXI to LXXV, Inclusive.

The remaining points noted in our brief, Nos. LXI to LXXV, inclusive, have either been embraced in one or more of the preceding points elaborated in our argument, and hence discussion of them would be mere repetition, or else they state rules of law well settled by decisions by this and other courts.

Concluding Remarks.

We come now to the conclusion of our argument. The complainants in this case are "a race once powerful, now reduced in numbers." They once owned the continent, of which but very small portions are left them. Little by little, they have given way to the superior energy and numbers of the white man; but what was taken from them was always under form of law. Even conquest was in the guise of "just and lawful wars," quoting the "Ordinance of 1787"; and after conquest came formal, and (ostensibly at least) voluntary, cession. What was ceded in the Northwest Territory was under pledge by the United States (2 Kappler, 42) to protect them "in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." The Indians now come into this court that that pledge may be redeemed. They ask it by the processes of peace. They are now weak and helpless, except as the law protects the weak with the strong. For many decades a treasure had lain hidden at the bottom of the Lake, all but forgotten. It is theirs. It is true, the presence of the white man has given it value, but it is none the less theirs. "The Indians cannot be despoiled of any part of their inheritance upon such a fallacious pretense" as enhanced values, said this court in *Leavenworth, etc. R. R. Co.* v. *United States*, 92 U. S. 733. We solemnly submit to this forum this supreme test of the good faith of the United States to the Indians. The test is as great as or greater than that which

confronted Chief Justice Marshall and his colleagues in *Worcester* v. *Georgia*, 6 Pet. 515. The administrative agencies are waiting for this tribunal to advise them as to their duty. The great traditions of this court give us courage to believe that the United States will stand true to the last by its word of promise to the Red Man.

It is respectfully submitted that the complainant Indians have made out a *prima facie* case of previous ownership of the lands in question, and thereby raised a presumption of title in themselves under Section 2126 R. S.; that the burden of proof rests upon the defendants; and hence the court below erred in dismissing the amended bill of complaint.

That, therefore, the decree of the court below should be reversed, etc.

W. W. DeArmond,
J. G. Grossberg,
Attorneys for Appellants.